TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929

No. 555

THE UNITED STATES OF AMERICA, PETITIONER

vs.

ALFRED E. NORRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 3, 1930
CERTIORARI GRANTED MARCH 3, 1930

(34686)

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In United States District Court for the Eastern District of Pennsylvania

No. 2865. June term, 1928

THE UNITED STATES OF AMERICA,	George W. Coles, Esq.
v.	
JOEL D. KERPER AND ALFRED E. NORRIS.	Ballard, Spahr, Andrews & Ingersoll, Esqs.

Docket entries

Sept. 13, 1928. True bill.
" 21, " Bond of A. E. Norris in $1,500, with Hartford Accident & Indemnity Company, surety, filed.
Dec. 3, " Petition for writ of habeas corpus ad prosequendum as to Joel D. Kerper filed.
" " " Order directing warden of U. S. Penitentiary at Atlanta, Ga., to produce Joel D. Kerper in court on Dec. 18, 1928, at 10 a. m. filed—Original petition and order given to marshal for service.
" 18, " J. D. Kerper enters a plea of former jeopardy.
" " " A. E. Norris pleads—Nolo contendere.
" " " Argued sur motion in arrest of judgment as to A. E. Norris.
2 Dec. 18, 1928. J. D. Kerper changes plea to guilty.
" " " Sentence as to J. D. Kerper: Imprisonment in Federal penitentiary, Atlanta, Ga., for 1 year and 3 months from September 28, 1928, this sentence to run concurrently with that imposed on Sept. 28, 1928 (2864).
Dec. 19, 1928. Motion by A. E. Norris in arrest of judgment filed.
" " " Stipulation of facts relative to A. E. Norris filed.
" 20, " Habeas corpus ad prosequendum served December 7, 1928, see letter to district attorney filed.
" 27, " Opinion, Kirkpatrick, J., sur plea of nolo contendere filed.
" " " Motion in arrest of judgment—Motion denied in open court.
" " " Sentence: Fine $200 as to A. E. Norris.
" " " Supersedeas bond sur appeal in $400, as to A. E. Norris filed.
" " " Præcipe for transcript of record sur appeal filed.
" " " Bill of exceptions and order of court sealing same filed.
" " " Assignments of error filed.
" " " Petition for appeal and supersedeas and order of court granting prayer of petition filed.
" " " Citation allowed and issued.
" " " Copy of notice of appeal filed.
Jan. 11, 1929. Citation returned—service accepted and filed.

3 In United States District Court

[Title omitted.]

Charge: Conspiracy to commit an offense against the United States. Violation of section 37, Federal Penal Code

Indictment

Filed September 13, 1928

The grand inquest of the United States of America, inquiring in and for the Eastern District of Pennsylvania, upon their oaths and affirmations respectively do present:

That heretofore, to wit, on or about the 28th day of October, 1926, and continuously thereafter to the date of this indictment, in the city and county of Philadelphia, Eastern District of Pennsylvania, and within the jurisdiction of this court, one Joel D. Kerper and one Alfred E. Norris and others to the grand jury unknown, did then and there wilfully, knowingly, unlawfully, and feloniously conspire, combine, confederate, and agree together and with each other to commit a certain offense against the United States of America, to wit, to wilfully, knowingly, and unlawfully transport, and cause to be transported, on various dates and from time to time, from Philadelphia, State of Pennsylvania, to New York, State of New York, certain shipments of intoxicating liquor, a more exact statement
4 of the said dates and a more exact description of the said shipments of intoxicating liquor and the amounts thereof being to the grand jury presently unknown, containing more than one-half of one per cent of alcohol by volume, and fit for beverage purposes, in violation of Title II of the national prohibition act, approved October 28, 1919.

That according to and in pursuance and furtherance of the said wilful, unlawful, and felonious conspiracy, confederacy, combination, and agreement, and to accomplish the purpose and effect the object thereof, one of the said defendants, to wit: Joel D. Kerper, did, on or about the first day of February, 1928, ship and cause to be shipped from Philadelphia, State of Pennsylvania, to the defendant Alfred E. Norris in the city of New York, State of New York, by express, a certain package containing six unlabeled bottles of intoxicating liquor, containing more than one-half of one per cent of alcohol by volume and fit for use for beverage purposes.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

COUNT II

And the grand inquest aforesaid, inquiring as aforesaid, upon their respective oaths and affirmations, do further present:

That heretofore, to wit, on or about the 28th day of October, 1926, and continuously thereafter to the date of this indictment, in the city

and county of Philadelphia, Eastern District of Pennsylvania, and within the jurisdiction of this court, one Joel D. Kerper and one Alfred E. Norris and others to the grand jurors unknown, did then and there unlawfully, knowingly, wilfully, and feloniously conspire,
5 combine, confederate, and agree together and with each other, to commit a certain offense against the United States of America, to wit, to wilfully, knowingly, and unlawfully ship and cause to be shipped, on various dates and from time to time, from Philadelphia, in the State of Pennsylvania, to New York, in the State of New York, packages containing spirituous and other intoxicating liquor, a more exact statement of the said dates and a more exact description of the said packages and of the said intoxicating liquor and the quantities thereof being to the grand inquest presently unknown, without labeling such packages on the outside cover thereof so as plainly to show the nature of the contents thereof and the quantity contained therein, in violation of section 240, Federal Penal Code.

That according to and in pursuance and furtherance of the said wilful, unlawful, and felonious conspiracy, confederacy, combination, and agreement, and to accomplish the purpose and effect the object thereof, one of the said defendants, to wit, Joel D. Kerper, did, on or about the first day of February, 1928, ship and cause to be shipped from Philadelphia, State of Pennsylvania, to the defendant, Alfred E. Norris, in the city of New York, State of New York, by express, a certain package containing six unlabeled bottles of intoxicating liquor, to wit, whiskey, the said package not being labeled on the outside cover thereof so as to plainly show the nature of the contents thereof and the quantity contained therein, but being falsely labeled so as to show that it contained grenadine.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

(Sgd.) GEORGE W. COLES,
United States Attorney.

Philadelphia, Pa., September 11, 1928.

6 In United States District Court

Minute entry of plea

And now, this 18th day of December, A. D. 1928, the defendant being arraigned pleads nolo contendere in manner and form as he stands indicted, and of this, etc.

In United States District Court

Bill of exceptions

Filed December 27, 1928

Be it remembered that on the arraignment of Alfred E. Norris, one of the above defendants, at the December term, 1928, of the

United States District Court for the Eastern District of Pennsylvania, said defendant being arraigned pleaded "nolo contendere," and

Be it further remembered, that at said term at the United States District Court for the Eastern District of Pennsylvania, this defendant came for sentence before the Honorable William H. Kirkpatrick and thereupon there was filed in the within cause with like force and effect as if included in the indictment, a duly executed stipulation or agreement of the facts constituting the basis of the said indictment, and there was filed on behalf of the said defendant a motion in arrest of judgment and thereafter the court denied the motion in arrest of judgment and sentenced the said defendant to pay a fine of two hundred dollars, and an exception was taken to the decree of the court denying the motion in arrest of judgment and to the sentence or judgment of the court; and

The said stipulation or agreement of facts, the motion in arrest of judgment, the action of the court thereon, and the judgment of the court are as follows:

7 "STIPULATION OF FACTS RELATIVE TO DEFENDANT ALFRED E. NORRIS

"It is agreed by and between E. G. Davis, special assistant to the Attorney General, and Charles Denby, Jr., assistant United States attorney, on behalf of the United States, and Charles I. Thompson, Esq., and Frederic L. Ballard, Esq., representing defendant, Alfred E. Norris, that for all purposes in connection with the above proceedings, the following facts shall be taken to be true and of record herein with like effect as if set forth in the indictment, to wit:

"Defendant, Alfred E. Norris, resides at 55 East Seventy-second Street, New York City. His business is that of investment banker.

"Joel D. Kerper, the other defendant, for some years prior to the date of the indictment in the above case, conducted at premises known as 341 Walnut Street, Philadelphia, Pa., a business consisting in major part of the sale and transportation incidental to sale, of intoxicating liquors, in violation of the National Prohibition Act. Pursuant to said business, the said Joel D. Kerper supplied a large number of customers in Philadelphia, New York, and other places. In the course of his business conducted as aforesaid, the said Joel D. Kerper on the dates indicated, made the following shipments by prepaid express from Philadelphia to the said Alfred E. Norris, addressed to him at 55 East Seventy-second Street, New York City. These shipments were labeled as containing the merchandise indicated in each case, and purported to be sent by the shippers named:

Date of shipment	Shipping document number	Alleged consignor	Alleged contents
[illegible]	920-901	J. Bowen & Co.	Syrup.
[illegible]	920-902	National Supply Co.	Olive oil.
3/17/27	920-942	C. Miller & Co.	Grenadine.
6/14/27	920-926	M. L. Brown & Co.	Olive oil.
6/29/27	920-926	M. L. Brown & Co.	Olive oil.
7/11/27	920-929	Gill & Co.	Grenadine.
[illegible]	920-931	D. P. Brown & Co.	Olive oil.
[illegible]	920-917	Penn Paint Co.	Paint.
[illegible]	920-921	Penn Paint Co.	Paint.
[illegible]	920-923	J. P. Simpson	Ink.
[illegible]	920-925	Paul J. Brown	Olive oil.
[illegible]	67-901	Penn Supply Co.	Grenadine.

"In all of the above cases, defendant, Joel D. Kerper, was the true shipper, instead of the fictitious shipper named; and in every instance the package contained an unlawful shipment of intoxicating liquor for beverage purposes; to wit: rye whiskey. Said shipments were made by defendant, Joel D. Kerper to defendant, Alfred E. Norris, to fill orders for rye whiskey given by said Alfred E. Norris to said Joel D. Kerper over the telephone. Payment for said rye whiskey was made from time to time by Norris to Kerper, either in cash or by check. The said rye whiskey was purchased by defendant, Alfred E. Norris, for his own consumption or that of his guests; and he was in no sense a dealer of liquor.

"MOTION IN ARREST OF JUDGMENT

"Comes now the defendant, Alfred E. Norris and moves the Court in arrest of judgment for the following reasons, to wit:

"1. Upon the face of the record the defendant is not guilty of the crimes charged.

"2. The record shows that defendant merely purchased liquor and the purchase of liquor is not a crime.

"3. The record fails to show in this defendant the degree of affirmative cooperation necessary to render him liable as a conspirator to the substantive offences involved—to wit: The unlawful transportation or false labelling of interstate shipments of liquor.

9 "DECREE DENYING MOTION IN ARREST OF JUDGMENT

"Dec. 27, 1928: Motion in arrest of judgment—Motion denied.

"JUDGMENT OF THE COURT

"Dec. 27, 1928: Sentence—fine $200 as to A. E. Norris."

In United States District Court

Order sealing bill of exceptions

Filed December 27, 1928

And thereupon on the 27th day of December, 1928, counsel for the said defendant did except to the aforesaid decree denying the

motion in arrest of judgment and to the sentence or judgment of the court, and did then and there tender his bill of exceptions to the said decree denying the motion in arrest of judgment, and to the sentence or judgment of the court, and did request that the seal of the judge aforesaid should be put to the same according to the form of the statute in such case made and provided, and thereupon the said judge, at the request of counsel for the said defendant, did put his seal to the bill of exceptions, pursuant to the aforesaid statute in such case made and provided this 27th day of December, 1928.

(Sgd.) W. H. KIRKPATRICK, [SEAL]
Judge.

Approved by

(Sgd.) CHARLES DENBY, JR.,
Asst. United States District Attorney.

(Sgd.) CHARLES I. THOMPSON,

(Sgd.) FREDERIC L. BALLARD,
Attorneys for Defendant,
Alfred E. Norris.

10 In United States District Court

Opinion sur plea of nolo contendere

Filed December 27, 1928

In the indictment the defendant Norris was charged in two counts with conspiring with Kerper, the other defendant to transport liquor in violation of (a) the national prohibition act, and (b) of section 240 of the Criminal Code. Kerper pleaded guilty, and Norris, with leave of court, entered a plea of nolo contendere. After plea, evidence in the form of an agreed stipulation of facts was submitted for the information of the court in determining what sentence, if any, ought to be imposed upon the defendant Norris. This involves a consideration of whether the things which the Government agrees that the accused has done constitute the crime charged. While the plea of nolo contendere raises no issue of law or fact under the indictment, the evidence consisting of the stipulation of facts will be received and made part of the record for the limited purpose above stated.

Summarized, the stipulated facts are as follows: Norris was a banker and resided in New York, Kerper was a bootlegger and had his residence and base of operations in Philadelphia. From time to time, Norris by telephone ordered whiskey from Kerper in Philadelphia. Twelve different orders were given covering a period of over a year. Upon receiving each order Kerper sent the whiskey ordered by express from Philadelphia to Norris in New York, in packages disguised as, paint, ink, olive oil, etc. The liquor was paid for by Norris from time to time and was drunk by him and his

guests. He did not sell or intend to sell any of it, nor did he take any part in its transportation other than as above stated.

We agree that the were purchase of liquor is not an offense
11 under the national prohibition act, and that the purchaser can not be convicted of aiding and abetting the sale. Further, we will assume, without deciding, that where there is nothing in the case but a simple sale the purchaser can not be convicted of conspiring with the seller to make the sale; though it may be noted that the Supreme Court in U. S. v. Katz, 271 U. S. 354 went no farther than to say that such an indictment would be of doubtful validity.

It does not follow, however, that, where transportation is required by the agreement, there may not be an indictment of the buyer and seller for conspiracy to transport, even though what is contemplated is simply the delivery of the thing sold. Transportation of intoxicating liquor is made a distinct substantive offense by the act. It is not necessarily involved in every sale. Even if it be conceded that in order to constitute a sale of an illegal commodity, as to which the law recognizes no such thing as title, there must be more than a bare contract to transfer ownership, and that no sale, as that term is used in the act, can be effected without a change of possession (*i. e.*, actual rather than constructive delivery), still, there are many ways in which such change of possession can take place without transportation. For example, the bootlegger might, without any previous understanding or even knowledge on the part of the other party, bring the liquor to the customer's house, sell it to him and leave it there, or there might be a sale of liquor together with the premises on which it was stored, followed by the seller's moving out and the purchaser's moving in. Hence, the rule which forbids indictments for conspiracy in that class of crimes which can not be committed, except by the agreement of two parties, is not to be extended to the transportation of liquor even though it may be incident to a sale. The dictum of the Supreme Court in U. S. v. Katz supra to the effect that the embarrassment caused by that rule
12 "could be avoided only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring the agreement of two persons for its completion," is plainly applicable to an indictment for conspiracy to transport.

The connection of the defendant Norris with the illegal transaction was decidedly more than "that degree of cooperation which would not amount to a crime" referred to by Justice Holmes in U. S. v. Holte, 236 U. S. 140. Of course, mere knowledge that a crime is about to be committed by another does not make the inactive party a conspirator, nor will awareness, coupled with acquiescence and possibly expressed approval and encouragement have that result. But in respect of the transportation, Norris did far more than know and acquiesce. He also did more than merely let Kerper know that he

was in the market for liquor. By his repeated orders of whiskey telephoned from New York to Philadelphia, he became party to an agreement which required Kerper to transport the liquor and he promised to pay him for doing it. Thus he not only solicited, but bound Kerper, by such obligation as the character of the transaction permitted, to commit the offense. As was pointed out in U. S. v. Holte supra, the word "commit" in the conspiracy statute means no more than "bring about." It is beyond all question that the purpose and intent of the agreement was to bring about the transportation of the liquor from wherever it may have been to Norris's home.

The conclusion is (1) that a conviction may be had of a buyer and seller of liquor for conspiracy to transport liquor in a case where the agreement is that the delivery of the liquor sold is to be effected by transportation from the seller to the buyer, and (2) that an
13 order by a purchaser to a bootlegger located at a distance, to deliver liquor followed by transportation, delivery and payment is sufficient evidence of such an agreement.

What has been said applies with equal if not greater force to the second count of the indictment.

It is the clear intent of Congress that the punishment for transporting liquor shall be by fine only. In this case the conspiracy element adds nothing by way of aggravation. The sentence imposed should not exceed that which would follow the conviction for transportation only.

BY THE COURT:
W. H. KIRKPATRICK, *J.*

In United States District Court

Motion in arrest of judgment

Filed December 19, 1928

Comes now the defendant, Alfred E. Norris, and moves the Court in arrest of judgment for the following reasons, to wit:

1. Upon the face of the record the defendant is not guilty of the crimes charged.

2. The record shows that defendant merely purchased liquor and the purchase of liquor is not a crime.

3. The record fails to show in this defendant the degree of affirmative cooperation necessary to render him liable as a conspirator to the substantive offences involved—to wit: the unlawful transportation or false labeling of interstate shipments of liquor.

CHARLES I. THOMPSON,
FREDERIC L. BALLARD,
Attorneys for Defendant,
Alfred E. Norris.

In United States District Court

Judgment

December 27, 1928

efore KIRKPATRICK, *J.*

And now, to wit, this twenty-seventh day of December, A. D. 928, all and singular the premises being seen and by the Court ere fully understood, it is considered and adjudged that the de- ndant, Alfred E. Norris, pay unto the United States of America fine of $200, and stand committed until judgment is fully complied ith.

BY THE COURT:
Attest: GEORGE BRODBECK,
Clerk.

In United States District Court

Assignments of error

Filed December 27, 1928

And now, to wit, this twenty-seventh day of December, 1928, comes lfred E. Norris by his attorneys, Frederic L. Ballard and Charles I. hompson, and assigns the following errors:

1. The learned court erred in denying defendant's motion in arrest f judgment, the said motion, defendant's exception thereto, and the ction of the court thereon being as follows:

"MOTION IN ARREST OF JUDGMENT

"Comes now the defendant, Alfred E. Norris, and moves the court arrest of judgment for the following reasons, to wit:

"1. Upon the face of the record the defendant is not guilty of e crimes charged.

"2. The record shows that defendant merely purchased liquor and the purchase of liquor is not a crime.

"3. The record fails to show in this defendant the degree of affirmative co-operation necessary to render him liable as conspirator to the substantive offences involved—to wit: the un- wful transportation or false labeling of interstate shipments of quor.

"ACTION OF COURT THEREON

"December 27, 1928: Motion in arrest of judgment. Motion nied."

2. The learned court erred in holding that the facts set forth in e indictment and stipulation of facts constituted a crime under e laws of the United States.

3. The learned court erred in holding that the facts set forth in the indictment and stipulation of facts constituted an offence under section 37 of the Federal Penal Code.

4. The learned court erred in entering judgment against the defendant, said judgment being

December 27, 1928: Sentence—fine $200 as to A. E. Norris.

(Sgd.) CHARLES I. THOMPSON
and
FREDERIC L. BALLARD,
Attorneys for Defendant,
Alfred E. Norris.

16 In United States District Court

Petition for appeal and supersedeas

Filed December 27, 1928

To the honorable William H. Kirkpatrick, Judge of the United States District Court:

Alfred E. Norris, one of the above-named defendants, conceiving himself aggrieved by the judgment entered in this cause on the twenty-seventh day of December, 1928, and by the denial of the motion in arrest of judgment on said date, does hereby appeal from said judgment and said denial of the motion in arrest of judgment to the Circuit Court of Appeals for the Third Circuit, for the reasons specified in the assignments of error, which are filed herein, and he prays that his appeal be allowed and that a citation issue as provided by law, directed to the above plaintiff, and that a transcript of the record, proceedings and papers upon which said judgment and denial of motion in arrest of judgment were based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit, sitting at Philadelphia, Pennsylvania.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made and that the said District Court by its proper judge may see fit to grant a supersedeas and stay of execution or of other proceedings pending such appeal.

(Sgd.) CHARLES I. THOMPSON
and
FREDERIC L. BALLARD,
Attorneys for Defendant,
Alfred E. Norris.

PHILADELPHIA, *December 27, 1928.*

17 In United States District Court

Order allowing appeal and supersedeas

Filed December 27, 1928

Before KIRKPATRICK, *Judge*.

And now, to wit, this twenty-seventh day of December, 1928, it is ordered that the appeal be allowed as prayed for and that security be entered by the appellant in the sum of four hundred dollars, appellant to sign his own appeal bond without surety.

And it is further ordered that the judgment appealed from be suspended pending said appeal.

By the court:

(Sgd.) W. H. KIRKPATRICK, *J*.

In United States District Court

Præcipe for transcript of record

Filed December 27, 1928

To the CLERK:

Certify to the Circuit Court of Appeals for the Third Circuit the following papers in the above-entitled case:

Docket entries.
Indictment.
Bill of exceptions.
Stipulations of facts.
Motion in arrest of judgment.
Order of court denying motion in arrest of judgment.
Judgment.
8 Opinion of the court.
Assignments of error.
Petition for appeal and supersedeas.
Clerk's certificate and no others.

CHARLES I. THOMPSON,
FREDERIC L. BALLARD,
Attorneys for Defendant,
Alfred E. Norris.

[Clerk's certificate to foregoing transcript omitted in printing.]

[Minute entry of argument and submission May 1, 1929, omitted in printing.]

21 In United States Circuit Court of Appeals for the Third Circuit

No. 4035. March term, 1929

ALFRED E. NORRIS, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Opinion

Filed October 3, 1929

Before BUFFINGTON and WOOLLEY, *Circuit Judges*, and THOMSON, *District Judge*.

THOMSON, *District Judge*.

Any confusion or uncertainty in this case arises, not so much from difficulty in the legal question before the court, but from the manner in which the question is presented.

To make this statement clear: If a demurrer had been filed by defendant to the first count in the indictment, it must necessarily have been overruled. This, because, the charge of conspiracy between Norris and Kerper to commit an offense against the United States, namely, to unlawfully transport liquors from Philadelphia to New York, was well laid, and a demurrer thereto, which for the purposes of the motion admits the facts, must necessarily fail. The crime being legally charged, the count is good, wholly aside from the question of the evidence necessary to sustain the charge.

In the same way, the case of United States v. Holte, 236 U. S. 140, illustrates the proposition. There a woman subjected to an unlawful interstate transportation under the white slave act, was indicted for conspiracy to commit the main offense with the person causing her to be transported. The indictment so charging was demurred to and the court below sustained the demurrer. In doing so, the court, of course, assumed that the woman was not subject to indictment for the substantive offense, and that although the offense could not be committed without her, she was not a party to it but only the victim, and that therefore conspiracy to commit the offense could not lie against her. In reversing this decision, Justice Holmes said:

"We do not have to consider what would be necessary to constitute the substantive crime under the act of 1910, or what evidence would be required to convict a woman under an indictment like this; but only to decide whether it is impossible for the transported woman to be guilty of a crime in conspiring as alleged."

In another portion of the opinion he said:

"So we think that it would be going too far to say that the defendant could not be guilty in this case."

The learned justice then gives a supposititious case by way of illustration, where an immoral woman should suggest and carry out a journey with a hope of blackmailing the man and should buy the railroad tickets or pay the fare, in which case she would be within the letter of the act of 1910, and no reason would be apparent in that case why the act should not be held to apply. Justice Holmes concludes the opinion with these words:

"Therefore the decisions that it is impossible to turn the concurrence necessary to effect certain crimes such as bigamy or duelling into a conspiracy to commit them do not apply."

In other words, it is not impossible under an indictment well laid for conspiracy between the man and woman to violate the Mann Act, to assume a set of circumstances which, if established, would show a conspiracy to commit the unlawful interstate transportation.

So, in the case at bar, the indictment as drawn, legally charged the offense of conspiracy to transport between Norris and Kerper, and there would be no difficulty in conceiving a set of facts, which, if established, would sustain such an indictment, notwithstanding the conspiracy existed between the seller and the buyer.

Counsel for the Government and for the defendant recognizing this principle of pleading, agreed upon a stipulation of facts having the same force and effect as if the same were set forth in the indictment. Their clear purpose was, as frankly stated and repeated by the Government's counsel in their argument, to bring before the Court for decision the single question whether a buyer and a seller of liquors, where transportation and delivery is made in pursuance of the sale, can be together indicted for a conspiracy to transport. To limit the inquiry to this single question, Government's counsel waived the second count in the indictment, and it is therefore not before the court. In seeking to have this question decided, counsel were in a measure unfortunate in selecting this particular case. This, because, it involves not a single sale, but many sales; because the seller was engaged in the business of sale and transportation of liquors in violation of the national prohibition law; because shipments were made by him in the name of fictitious consignors and because the packages were falsely labeled as merchandise. These facts have a tendency to confuse the issue, as from them certain inferences or conclusions might be drawn, establishing, or tending to establish, an unlawful combination between the parties to transport the liquors so sold.

The learned judge conceded that the mere purchase of liquor is not an offense under the prohibition act, and that the purchaser can not be convicted of aiding and abetting the sale; and he assumed, without deciding, that where there was nothing in the case but a simple sale, the purchaser cannot be convicted of conspiracy with

the seller to make the sale. But with reference to conspiracy between buyer and seller to transport, he says:

"The connection of the defendant Norris with the illegal transaction was decidedly more than 'that degree of cooperation which would not amount to a crime' referred to by Justice Holmes in United States v. Holte. Of course, mere knowledge that a crime is about to be committed by another does not make the inactive party a conspirator, nor will awareness, coupled with acquiescence, and possibly expressed approval and encouragement, have that result. But in respect to the transportation, Norris did far more than know and acquiesce. He also did more than merely let Kerper know that he was in the market for liquor. By his repeated orders of whiskey, telephoned from New York to Philadelphia, he became a party to an agreement which required Kerper to transport the liquor and he promised to pay him for doing it. Thus he not only solicited, but bound Kerper, by such obligation as the character of the transaction permitted, to commit the offense."

23 From this he concludes "that a conviction may be had of buyer and seller of liquor for conspiracy to transport liquor in a case where the agreement is that the delivery of the liquor sold is to be effected by transportation from the seller to the buyer."

It is thus clear from this broad legal conclusion, that the court treated the stipulated facts as raising the single question whether conspiracy can be maintained between seller and buyer, where delivery of the liquor is to be effected by transportation from the seller to the buyer. This is the precise question which the parties desired should be decided by this court. In the stipulated facts, there is but one buyer and one seller. The transportation and delivery were made by the seller at his expense, the sale being initiated by the telephone order of the purchaser, and the liquors so purchased were for the consumption of the purchaser and his guests.

The second finding, which the court holds is sufficient evidence of such an agreement between seller and buyer, adds nothing to the conclusion reached in his first finding, namely, where a purchaser orders the liquors from a bootlegger located at a distance, followed by transportation, delivery, and payment. If these facts were intended by the court to support a conclusion which could not be drawn from the mere fact of purchase, followed by transportation and delivery from the seller, the purpose of the parties to obtain a decision on the real question would be frustrated.

Counsel for both parties conceded at the argument on this appeal that the learned trial judge in his opinion made a clear and precisely accurate statement of all the facts in these few words:

"Summarized, the stipulated facts are as follows: Norris was a banker and resided in New York; Kerper was a bootlegger and had his residence and base of operations in Philadelphia. From time to time, Norris by telephone ordered whiskey from Kerper in Philadelphia. Twelve different orders were given cover-

ing a period of over a year. Upon receiving each order Kerper sent the whiskey ordered by express from Philadelphia to Norris in New York, in packages disguised as paint, ink, olive oil, etc. The liquor was paid for by Norris from time to time and was drunk by him and his guests. He did not sell or intend to sell any of it, nor did he take any part in its transportation other than as above stated."

We assume, therefore, that the court did not intend in this recital of facts, to narrow the broad legal proposition which he announced in his first conclusion.

We will therefore consider and decide the interesting and very important question thus raised.

The conclusion which we have reached is based on the following considerations:

1st: It is conceded that under the eighteenth amendment, and the Volstead Act, passed to carry it into effect, the purchase of liquor is not made an offense. It follows that the purchase as such, does not subject the buyer to punishment. This is perfectly clear from the act itself. Not only did Congress carefully exclude the purchaser from the penal provisions of the act as originally passed, but has taken no step to extend its provisions to the purchaser in the ten years of legislation which have since intervened. That the intention and purpose of Congress is in harmony with the act, as drawn, is thus made perfectly manifest.

2nd: While the seller of liquor, who delivers it to the purchaser, is liable under the law both for the sale and transportation, the purchaser to whom the goods are delivered as chargeable with neither the purchase nor the transportation. It thus appears that while the legislative department of the Government has deliberately and intentionally made the purchaser of liquor guiltless of any offense under the prohibition law, the executive department of the Government seeks here, by indirection, to make of the same fact, namely, the purchase, a crime subjecting the purchaser to a maximum fine of $10,000, and imprisonment for a term of two years. Such a situation is scarcely conceivable, and yet that is the position of the Government.

3d: Concerning the crime of conspiracy, it is a well-established principle that where an offense is such that a concert of action between two persons is logically necessary to the completion of the crime, that is to say, the crime can not take place without concert, a charge of conspiracy against the two persons to commit that crime does not lie. This is the language of Judge Thompson in the case of United States v. Katz, 5 Fed. (2d) 527.

On appeal, the Supreme Court affirmed the soundness of this rule in United States v. Katz, 271 U. S. 354. Justice Stone, speaking for the court, said:

"The overt act charged in the indictment was the sale of whiskey by one defendant to another. This is an offence under the National Prohibition Act; but as the defendants in each case were only one

buyer and one seller; and as the agreement of the parties was an essential element of the sale, an indictment of the buyer and seller for conspiracy to make the sale would have been of doubtful validity. (Citing a number of cases.) This embarrassment could be avoided in an indictment for a criminal conspiracy only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring the agreement of two persons for its completion."

See also Vannata v. U. S. 288, Fed. 424, C. C. A. Second Circuit.

In La Rosa v. U. S., 15 Fed. (2d) 479, La Rosa was indicted with Martin and Belman for conspiring to sell, barter, transport, deliver, furnish, possess, and manufacture intoxicating liquor. It appears that the only understanding La Rosa had with Martin and Belman was that he would buy certain whiskey from them and show them how to get it to his garage. The judgment of conviction for conspiracy was reversed on the appeal. Notwithstanding, there was evidence in the case from which it could be fairly said that La Rosa aided and abetted the transportation; yet, Judge Rose, speaking for the Circuit Court of Appeals, declined to consider the question of conspiracy to transport, in effect holding that it was too unsubstantial to merit serious consideration.

In Becker v. U. S., 5 Fed. (2d) 45, there was a charge of conspiracy against several defendants to commit different offenses. Liquor was found in the cellar of one of the defendants, Birnbaum, which had been delivered there, and he contended that he was merely a buyer and that there was no proof that he was a conspirator with the others. Speaking for a unanimous court, Judge Learned Hand said:

"We concede at once that merely as buyer he was not a party to the scheme in any criminal sense; that on the contrary the prosecution was bound to involve him in the plan as a whole in some other sense."

4th: In the case of seller and buyer, transportation by the seller is a mere incident in the sale, and necessary to its completion by delivery to the purchaser. It is an inherent feature, an essential element of the sale, which the seller had, on his part, to perform. The sale necessarily involves an agreement, a concert of action, between buyer and seller to effect the purchase; and it could not, with any reason be said, that a conspiracy would lie to do something which was an essential element of the sale.

Finally: Under the authorities it can not be held that the purchaser as such, is guilty of aiding and abetting either the sale or the delivery; and the degree of cooperation necessary to constitute one a conspirator, must be such as to amount to more than the mere aiding and abetting in the commission of the offence. The degree of cooperation attaching to the purchaser is fully discussed in State v. Teahan, 50 Conn. 92. That opinion concludes with these words:

"The purchaser of liquor, by his offer to buy, induces the seller of the liquor to make the sale; but he can not be said to assist him in it. The whole force, moral or physical, that went to the production of the crime as such, was the seller's."

In Lott v. United States, 205 Fed. 28, C. C. A. 9th Circuit, the court said:

"It is uniformly held that Statutes prohibiting the sale of intoxicating liquors are directed against the selling only, and that the offence is committed only by the vendor or some one who aids him in selling, and the purchaser, and those who aid him in the purchase, are not guilty of aiding or abetting in the commission of the offence."

The essential requirement of conspiracy is clearly set forth by the Circuit Court of Appeals for the Second Circuit, in the case of Lucadamo v. U. S. 280 Fed. 653.

There the court shows that knowledge, acquiescence or approval of the act, is not sufficient. To constitute a conspiracy, the evidence must show an intentional participation in the attempt to commit the offense. The lack of active cooperation between the seller and the buyer, generally speaking, is well stated in the case of State v. Teahan, 80 Conn., supra, in which the court says:

"We are satisfied that the purchaser is not an abettor of the offence within the meaning of the statute. The abetting intended by it is a positive act, in aid of the commission of the offence—a force, physical or moral, joined with that of the perpetrator in producing it . . . The abettor, within the meaning of the statute, must stand in the same relation to the crime as the criminal—approach it from the same direction, touch it at the same point. This is not the case with the purchaser of liquor. His approach to the crime is from the other side; he touches it at wholly another point. It is somewhat like the case of a man who provokes or challenges another to fight with him. If the other knocks him down, he has induced, but in no proper sense abetted, this act of violence. He has not contributed any force to its production. He touches the offence wholly on the other side. The purchaser of liquor; by his offer to buy, induces the seller of the liquor to make the sale; but he can not be said to assist him in it. The whole force, moral or physical, that went to the production of the crime as such, was the seller's."

From the foregoing considerations we are of opinion that a sale of liquor involving such transportation as is necessary to effect the delivery to the purchaser, does not subject the purchaser and seller to an indictment for conspiracy to transport. The judgment is therefore reversed.

Buffington, J., dissents.

A true copy:

Teste:

_____,

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

26 In United States Circuit Court of Appeals for the Third Circuit

No. 4035 (list No. 66). March term, 1929

ALFRED E. NORRIS, Appellant
vs.
UNITED STATES, Appellee

Judgment
Oct. 3, 1929

On appeal from the District Court of the United States for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, reversed.

Philadelphia, October 3, 1929.

VICTOR B. WOOLLEY,
Circuit Judge.

27 [Clerk's certificate to foregoing transcript omitted in printing.]

28 Supreme Court of the United States

Order allowing certiorari
Filed March 3, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the cause is advanced and assigned for argument at the head of the call on Monday, April 14th, next.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Indorsement on cover:) File No. 34,686. U. S. Circuit Court of Appeals, Third Circuit. Term No. 555. The United States of America, petitioner, vs. Alfred E. Norris. Petition for writ of certiorari and exhibit thereto. Filed January 3, 1930. File No. 34,[illegible]

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FILE COPY

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No. 555

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALFRED E. NORRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO REASSIGN FOR ARGUMENT

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 555

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALFRED E. NORRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION TO REASSIGN FOR ARGUMENT

The Attorney General moves that the above-entitled case, heretofore assigned for argument at the head of the call on Monday, April 14, next, be reassigned for argument at the head of the call on Monday, April 28, next, and as grounds therefor respectfully represents:

1. The case is before the Court on writ of certiorari to the Circuit Court of Appeals for the Third Circuit granted March 3, 1930, upon application of the United States. It involves the question whether one who repeatedly procures the shipment to him of intoxicating liquor for his personal consumption as a beverage is guilty of having con-

101486—30

spired with the consignor to transport such liquor in violation of the National Prohibition Act. In deciding that question in the negative the Circuit Court of Appeals based its decision in part on the ground that the purchase of liquor for beverage purposes is not an offense.

2. The case of *United States* v. *James E. Farrar*, No. 732, docketed in this Court on March 12, 1930, involves a construction of the National Prohibition Act on the question whether it prohibits the purchase of intoxicating liquor without a permit from the Commissioner of Prohibition, and arises out of the quashing of an indictment charging Farrar with the purchase of intoxicating liquor in violation of said Act. The case has been brought to this Court by the United States under the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), which provides that such cases shall have precedence over all other cases.

3. Although the Government does not consider that the question involved in the *Farrar case* requires decision in the *Norris case* it will undoubtedly be urged in this Court by the respondent in the latter case. It is therefore believed that the argument of the *Farrar case* should immediately follow the argument of the *Norris case* in order that the two cases may conveniently be considered and disposed of by the Court at the same time. By reason of the period which must elapse under Rule 12 of this Court before the statement of jurisdic-

tion may be submitted, it will be impossible to have the *Farrar case* ready for argument prior to April 28, 1930. Therefore, this motion is presented.

Opposing counsel concur.

Respectfully submitted.

WILLIAM D. MITCHELL,
Attorney General.

MARCH, 1930.

U. S. GOVERNMENT PRINTING OFFICE, 1930

FILED
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CHARLES ELMORE

FILE COPY

No. 555

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALFRED E. NORRIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1929

No. —

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALFRED E. NORRIS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit, entered in the above entitled cause on October 3, 1929, reversing the judgment of the District Court of the United States for the Eastern District of Pennsylvania.

STATEMENT

The respondent and one Joel D. Kerper were jointly indicted in the District Court of the United

States for the Eastern District of Pennsylvania upon two counts, the first charging that the de-defendants (R. 3)—

> did * * * conspire * * *, together and with each other to commit a certain offense against the United States of America, to wit: to * * * transport * * * on various dates and from time to time, from Philadelphia, State of Pennsylvania, to New York, State of New York certain shipments of intoxicating liquor * * * containing more than one-half of one per cent. of alcohol by volume, and fit for beverage purposes, in violation of Title II of the National Prohibition Act * * *.

As an overt act in furtherance of the conspiracy charged, the indictment alleged that on or about February 1, 1928, the defendant Kerper shipped from Philadelphia, Pennsylvania, to the defendant Norris in New York, New York, a package containing six unlabeled bottles of intoxicating liquor containing more than one-half of one per cent of alcohol by volume and fit for beverage purposes. (R. 4.)

In the second count the defendants were charged with having conspired to ship on various dates and from time to time from Philadelphia, Pennsylvania, to New York, New York, packages containing spirituous and other intoxicating liquor, without labeling such packages on the outside thereof so as plainly to show the nature and quantity of the contents, in violation of Section 240 of the

Criminal Code. An overt act in support of this count was also alleged. (R. 4, 5.)

The defendant Kerper pleaded guilty to the indictment and was sentenced to imprisonment for one year and three months in the Federal penitentiary at Atlanta, Georgia, the sentence to run concurrently with that imposed upon him in another case. (R. 2.) The defendant Norris pleaded *nolo contendere* (R. 6), and upon the entry of that plea the following stipulation was filed (R. 7–8):

STIPULATION OF FACTS RELATIVE TO DEFENDANT ALFRED E. NORRIS

It is agreed by and between E. G. Davis, Special Assistant to the Attorney General, and Charles Denby, Jr., Assistant United States Attorney, on behalf of the United States and Charles I. Thompson, Esq., and Frederic L. Ballard, Esq., representing defendant, Alfred E. Norris, that for all purposes in connection with the above proceedings, the following facts shall be taken to be true and of record herein with like effect as if set forth in the indictment, to wit:

Defendant, Alfred E. Norris, resides at 55 East Seventy-second Street, New York City. His business is that of investment banker.

Joel D. Kerper, the other defendant, for some years prior to the date of the indictment in the above case, conducted at premises known as 341 Walnut Street, Philadelphia, Pa., a business consisting in major part of the sale and transportation incidental to sale, of intoxicating liquors, in

violation of the National Prohibition Act. Pursuant to said business, the said Joel D. Kerper supplied a large number of customers in Philadelphia, New York and other places. In the course of his business conducted as aforesaid, the said Joel D. Kerper on the dates indicated, made the following shipments by prepaid express from Philadelphia to the said Alfred E. Norris, addressed to him at 55 East Seventy-second Street, New York City. These shipments were labeled as containing the merchandise indicated in each case, and purported to be sent by the shippers named:

Date of shipment	Shipping document number	Alleged consignor	Alleged contents
10/28/26	800-901	J. Bowen & Co.	Syrup.
11/5/26	800-949	National Supply Co.	Olive oil.
2/17/27	800-942	C. Miller & Co.	Grenadine.
6/14/27	800-938	M. L. Brown & Co.	Olive oil.
6/20/27	800-936	M. L. Brown & Co.	Olive oil.
7/11/27	800-933	Gill & Co.	Grenadine.
8/5/27	800-931	D. P. Brown & Co.	Olive oil.
9/2/27	800-917	Penn Paint Co.	Paint.
10/17/27	800-921	Penn Paint Co.	Paint.
11/17/27	800-923	J. P. Simpson	Ink.
12/9/27	800-925	Paul J. Brown	Olive oil.
2/1/28	67-901	Penn Supply Co.	Grenadine.

In all of the above cases defendant, Joel D. Kerper, was the true shipper, instead of the fictitious shipper named; and in every instance the package contained an unlawful shipment of intoxicating liquor for beverage purposes; to wit: rye whiskey. Said shipments were made by defendant, Joel D. Kerper to defendant, Alfred E. Norris, to fill orders for rye whiskey given by said

> Alfred E. Norris to said Joel D. Kerper over the telephone. Payment for said rye whiskey was made from time to time by Norris to Kerper, either in cash or by check. The said rye whiskey was purchased by defendant, Alfred E. Norris, for his own consumption or that of his guests; and he was in no sense a dealer of liquor.

Norris thereupon moved in arrest of judgment, assigning the following reasons (R. 8):

> 1. Upon the face of the record the defendant is not guilty of the crimes charged.
>
> 2. The record shows that defendant merely purchased liquor and the purchase of liquor is not a crime.
>
> 3. The record fails to show in this defendant the degree of affirmative cooperation necessary to render him liable as a conspirator to the substantive offences involved—to wit: the unlawful transportation or false labelling of interstate shipments of liquor.

The motion was denied and Norris was sentenced to pay a fine of $200. (R. 9.) In an opinion contemporaneously handed down (R. 10–13) the District Court "agreed" that the mere purchase of liquor is not an offense under the National Prohibition Act and that the purchaser can not be convicted of aiding and abetting the sale. It furthermore assumed, but without deciding, that where there is nothing in the case but a simple sale the purchaser can not be convicted of conspiring with the seller to make the sale, referring in this con-

nection to the statement of this Court in *United States* v. *Katz*, 271 U. S. 354, that an indictment for conspiracy in such a case would be of doubtful validity. Distinguishing the instant case from one of a simple sale, however, the District Court said (R. 11):

> It does not follow, however, that, where transportation is required by the agreement, there may not be an indictment of the buyer and seller for conspiracy to transport, even though what is contemplated is simply the delivery of the thing sold. Transportation of intoxicating liquor is made a distinct substantive offense by the Act. It is not necessarily involved in every sale. Even if it be conceded that in order to constitute a sale of an illegal commodity, as to which the law recognizes no such thing as title, there must be more than a bare contract to transfer ownership, and that no sale, as that term is used in the act, can be effected without a change of possession (*i. e.*, actual rather than constructive delivery), still, there are many ways in which such change of possession can take place without transportation. For example, the bootlegger might, without any previous understanding or even knowledge on the part of the other party, bring the liquor to the customer's house, sell it to him and leave it there, or there might be a sale of liquor together with the premises on which it was stored, followed by the seller's moving out and the purchaser's moving in. Hence,

> the rule which forbids indictments for conspiracy in that class of crimes which can not be committed, except by the agreement of two parties, is not to be extended to the transportation of liquor even though it may be incident to a sale. The dictum of the Supreme Court in *U. S.* v. *Katz, supra,* to the effect that the embarrassment caused by that rule "could be avoided only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring the agreement of two persons for its completion," is plainly applicable to an indictment for conspiracy to transport.

Regarding defendant's contention that the record failed to show that degree of cooperation on his part necessary to make him a conspirator to commit the substantive offenses of illegally transporting and shipping liquor, as charged, the court declared (R. 12):

> Of course, mere knowledge that a crime is about to be committed by another does not make the inactive party a conspirator, nor will awareness, coupled with acquiescence and possibly expressed approval and encouragement have that result. But in respect of the transportation, Norris did far more than know and acquiesce. He also did more than merely let Kerper know that he was in the market for liquor. By his repeated orders of whiskey telephoned from New York to Philadelphia, he became party to an agree-

> ment which required Kerper to transport the liquor and he promised to pay him for doing it. Thus he not only solicited, but bound Kerper, by such obligation as the character of the transaction permitted, to commit the offense. As was pointed out in *U. S.* v. *Holte, supra* (236 U. S. 140), the word "commit" in the conspiracy statute means no more than "bring about." It is beyond all question that the purpose and intent of the agreement was to bring about the transportation of the liquor from wherever it may have been to Norris's home.

In concluding its opinion, the court summarized the foregoing statement of the law applicable to the stipulated facts as follows (R. 12–13):

> The conclusion is (1) that a conviction may be had of a buyer and seller of liquor for conspiracy to transport liquor in a case where the agreement is that the delivery of the liquor sold is to be effected by transportation from the seller to the buyer, and (2) that an order by a purchaser to a bootlegger located at a distance, to deliver liquor followed by transportation, delivery and payment is sufficient evidence of such an agreement.
>
> What has been said applies with equal if not greater force to the second count of the indictment.

Upon appeal, the judgment was reversed by the Circuit Court of Appeals, one judge dissenting. In that court, counsel for the Government, with a

view to limiting the inquiry to the question whether a charge of conspiracy to transport liquor illegally will lie against the purchaser and the seller of the liquor where the negotiations resulting in the sale contemplated a transportation and a delivery of the liquor, waived the second count in the indictment and that count was not considered by the court.

The considerations which led the Circuit Court of Appeals to conclude that "a sale of liquor involving such transportation as is necessary to effect the delivery to the purchaser, does not subject the purchaser and seller to an indictment for conspiracy to transport" may be summarized as follows: (1) Under the Eighteenth Amendment and the National Prohibition Act, the purchase of liquor is not an offense; (2) the indictment of a purchaser for conspiracy with the seller is an attempt to make the purchaser liable indirectly for an act which Congress has refused to make an offense; (3) a charge of conspiracy to commit an offense will not lie where a concert of action between the parties charged is necessary to the commission of the substantive crime; (4) in the case of buyer and seller, transportation by the seller is a mere incident of the sale necessary to its completion by delivery to the purchaser, and as a sale necessarily involves an agreement, or concert of action, between the buyer and the seller to effect the purchase, a charge of conspiracy will not lie against the purchaser for agreeing with the seller

that the liquor shall be transported and delivered to the purchaser; (5) under the authorities, a purchaser is not guilty of aiding and abetting either the sale or the delivery, and the degree of cooperation to constitute one a conspirator must be more than that involved in the mere aiding and abetting of the commission of the substantive offense.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In reversing the judgment of the District Court.

2. In holding that "a sale of liquor involving such transportation as is necessary to effect the delivery to the purchaser, does not subject the purchaser and seller to an indictment for conspiracy to transport."

3. In holding that one who gives orders to a bootlegger in another city to ship him intoxicating liquor for beverage purposes and who receives and pays for the shipments of liquor consigned to him by said bootlegger in response to such orders is not guilty of conspiracy to transport intoxicating liquor in violation of the National Prohibition Act.

4. In holding that the evidence failed to show such a degree of cooperation by Norris in the illegal transportation as to render him guilty as a conspirator to commit that offense.

REASONS FOR GRANTING THE WRIT

The question involved in this case is one of great public interest and importance. The decision of

the court below has been given wide publicity. Unless corrected by this Court, it will have a very detrimental effect upon the enforcement of the prohibition laws. The reasons advanced by the court below might equally prevent successful prosecution of a purchaser for a conspiracy to import liquor.

Furthermore, by misapplication of the rule that a charge of conspiracy to commit an offense will not lie where a concert of action on the part of those charged was essential to the commission of the substantive crime, the court has narrowed the scope of the conspiracy statute so as to render it inapplicable to a large number of cases to which, we submit, it does apply. In this respect the decision affects not only conspiracies to violate the prohibition laws, but other conspiracies to commit offenses against the United States.

Wherefore, it is respectfully submitted that this petition for certiorari to review the judgment of the Circuit Court of Appeals in the above-entitled cause should be granted.

CHARLES E. HUGHES, JR.,
Solicitor General.

JANUARY, 1930.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 10–13) is reported in 29 F. (2d) 744, and that of the Circuit Court of Appeals in 34 F. (2d) 839.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 3, 1929. The jurisdiction of this Court to issue the writ applied for is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

This case presents the question whether one who repeatedly sends telephone orders to a bootlegger in another city to ship him intoxicating liquor for beverage purposes and who receives and pays for the liquor shipped to him by the bootlegger pursuant to such orders is guilty of conspiracy to transport intoxicating liquor in violation of the National Prohibition Act.

STATUTES INVOLVED

Section 3, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 308 (U. S. C. Title 27, Sec. 12) provides, so far as here important:

> No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Section 37 of the Criminal Code (U. S. C. Title 18, Sec. 88) provides:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined * * *.

STATEMENT

A statement of the case and the errors relied upon will be found in the petition.

ARGUMENT

While the court below holds that the purchase of liquor is not an offense under the National Prohibition Act and speaks of this prosecution as an attempt to make the respondent liable indirectly for an act which was a mere incident in the purchase of liquor, the case actually does not involve the question whether the purchase of liquor is or is not an offense.

The court reached its decision upon the following line of reasoning: That a charge of conspiracy to commit an offense will not lie where a concert of action between the parties charged is necessary to the commission of the substantive crime; that where liquor is sold by one person to another it is essential that there be a concert of action between the buyer and seller to effectuate the sale, and, therefore, neither can be charged with conspiracy

to make the sale; that delivery of the thing sold is essential to consummate the sale, and that, as delivery in the present case could be accomplished only by transporting the liquor to the place of delivery, the transportation was a mere incident of the sale necessary to its completion by delivery to the purchaser, and, therefore, neither party to the transaction is subject to prosecution for conspiracy to bring about such transportation.

We submit that this reasoning is fallacious. The offense charged in the indictment was not conspiracy to *sell* liquor but conspiracy to *transport* it. Under Section 3, Title II, of the National Prohibition Act, the offense of transporting liquor is committed when the transportation is effected in any manner or for any purpose not authorized by that Title. *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100. As was said by this Court in that case (pp. 121–122):

> Some of the contentions ascribe a technical meaning to the words "transportation" and "importation." We think they are to be taken in their ordinary sense, for it better comports with the object to be attained. In that sense transportation comprehends any real carrying about or from one place to another. It is not essential that the carrying be for hire, or by one for another; *nor that it be incidental to a transfer of the possession or title.* If one carries in his own conveyance for his own purposes

> it is transportation no less than when a public carrier at the instance of a consignor carries and delivers to a consignee for a stipulated charge. (Italics ours.)

See also *Grogan* v. *Walker & Sons*, 259 U. S. 80, 90; *Corneli* v. *Moore*, 257 U. S. 491, 496–497.

It is immaterial, therefore, by whom or for what purpose the transportation takes place if not authorized by the Act. Whether it be for the purpose of sale at destination, for personal consumption by the transporter, or for delivery to one to whom it has been sold, the offense is nevertheless committed. In the present case, it is conceded that the liquor was transported and for beverage purposes. As such a transportation was not authorized by Title II of the National Prohibition Act, it was clearly an offense under Section 3.

We submit that the language of this Court in *United States* v. *Katz*, 271 U. S. 354–355, tends to support the conspiracy charge in this case. The Court said:

> The overt act charged in each indictment was the sale of whisky by one defendant to the other. This is an offense under the National Prohibition Act; but as the defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity. Compare *United States* v. *N. Y. C. & H. R. R.*, 146 Fed. 298;

United States v. *Dietrich*, 126 Fed. 664; *Vannata* v. *United States*, 289 Fed. 424, 427. This embarrassment could be avoided in an indictment for a criminal conspiracy only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring the agreement of two persons for its completion. See *Chadwick* v. *United States*, 141 Fed. 225.

Unlike the offense of illegally selling liquor, which necessarily requires for its commission an agreement or concert of action, tacit or otherwise, between buyer and seller, the offense of transportation may be committed by one person without any agreement or concert of action with anyone else. See *Chadwick* v. *United States* (C. C. A. 6th), 141 Fed. 225, 236. The rule that a charge of conspiracy to commit an offense, such as illegal sale, bribery, bigamy, adultery, dueling, and the like, will not lie where the only persons charged are those whose agreement or concert of action is essential to the commission of the substantive crime, has no application, therefore, to a charge of conspiracy to transport in violation of law.

Recognizing the force of the foregoing principles, and in order to avoid their effect, the court below adopted the theory that the transportation of liquor in this case was not a transportation prohibited by Section 3, but was a mere incident of the sale of the liquor. This conclusion was based upon the further

holdings of the court that delivery of the liquor was required to complete the sale and that the transportation in question was essential to effect such delivery. It is settled, however, that actual delivery to the purchaser of the article sold is not essential to a completion of the sale. Thus, it has been held that the seller fulfills his obligation where the goods are placed at the buyer's disposal so that he may remove them without legal obstruction (*Glasgow* v. *Nicholson,* 25 Mo. 29; *Davis* v. *Alpha Portland Cement Co.,* 134 Fed 274); or where the goods are at a distance from the place of sale and the buyer is told to go and take them (*Patrick* v. *Meserve,* 18 N. H. 300).

Moreover, even if it be conceded that a sale can not be consummated without an actual delivery of the thing sold, it is nevertheless plain that such delivery may be made without a transportation. This is illustrated by the examples given by the District Court of the case where a bootlegger, without any previous understanding or knowledge on the part of the purchaser, takes liquor to his house, sells it to him and leaves it there; as well as of the case where liquor and the premises upon which it is stored are sold together and the purchaser moves in upon the seller's moving out.

But even if it were assumed that the transportation here involved was, as the court held, a mere incident of the sale, it is nevertheless submitted that such transportation would be an offense under Section 3, for, as indicated by the decisions of this

Court heretofore cited, that offense is committed by any transportation not authorized by Title II of the Act.

We submit also that the Circuit Court of Appeals erred in its further holding that the facts failed to show such a degree of cooperation by Norris in the illegal transportation as to render him guilty as a conspirator to commit that offense. His repeated orders telephoned from New York to Philadelphia and his receipt of and payment for the consignments of liquor shipped to him pursuant thereto leave no room for doubt that the illegal transportations were the result of an agreement, mutual understanding, or concert of action between him and his codefendant Kerper.

The effect of the opinion of the Circuit Court of Appeals seems to be that ordinary rules of criminal liability for conspiracy may not be invoked against a purchaser of liquor. We submit that such a notion finds no support in the law. Whether or not the National Prohibition Act makes the act of purchase a crime in itself (a question which is not involved in this case), it manifestly does not invest the purchaser with any special immunity from the consequences of doing those things which beyond question are made criminal. If the purchaser carries the liquor to his home, he is guilty of the crime of transportation, and while he keeps it he is guilty of the crime of possession. If a purchaser agrees

and cooperates with the seller to have the liquor transported not to himself but to a friend, it seems clear that he is guilty of a conspiracy to transport. We submit that there is no reason why the fact that the agreed transportation is to himself makes him less guilty.

CONCLUSION

The case was incorrectly decided below. It involves a question of sufficient general importance to justify a review by this Court. The petition for certiorari should therefore be granted.

Respectfully submitted.

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No. 555

In the Supreme Court of the United States

OCTOBER TERM, 1929

THE UNITED STATES OF AMERICA, PETITIONER

v.

ALFRED E. NORRIS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 6–8) is reported in 29 F. (2d) 744, and that of the Circuit Court of Appeals (R. 12–17) in 34 F. (2d) 839.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered October 3, 1929. (R. 18.) The petition for certiorari was filed January 3, 1930, and was granted March 3, 1930. (R. 18.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question in this case is whether a person who gave repeated telephone orders to a bootlegger in

another State to ship him intoxicating liquors for beverage purposes and who received and paid for liquors shipped to him by the bootlegger pursuant to such orders is guilty of conspiracy to transport intoxicating liquors in violation of the National Prohibition Act.

STATUTES INVOLVED

Section 3, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 308 (U. S. C. Title 27, Sec. 12), provides, so far as here important:

> No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

Section 37 of the Criminal Code (U. S. C. Title 18, Sec. 88) provides:

> If two or more persons conspire * * * to commit any offense against the United States * * * and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined * * *.

STATEMENT OF FACTS

The respondent and one Joel D. Kerper were jointly indicted in the District Court of the United States

for the Eastern District of Pennsylvania upon two counts, the first charging that the defendants (R. 2)—

> did * * * conspire * * * together and with each other to commit a certain offense against the United States of America, to wit, to * * * transport * * * on various dates and from time to time, from Philadelphia, State of Pennsylvania, to New York, State of New York, certain shipments of intoxicating liquor * * * containing more than one-half of one per cent of alcohol by volume, and fit for beverage purposes, in violation of Title II of the national prohibition act * * *.

As an overt act in furtherance of the conspiracy charged, the indictment alleged that on or about February 1, 1928, the defendant Kerper shipped from Philadelphia, Pennsylvania, to the defendant Norris in New York, New York, a package containing six unlabeled bottles of intoxicating liquor containing more than one-half of one per cent of alcohol by volume and fit for beverage purposes. (R. 2.)

In the second count the defendants were charged with having conspired to ship on various dates and from time to time from Philadelphia, Pennsylvania, to New York, New York, packages containing spirituous and other intoxicating liquor, without labeling such packages on the outside thereof so as plainly to show the nature and quantity of the contents, in violation of Section 240 of the Criminal Code. An overt act in support of this count was also alleged. (R. 3.)

The defendant Kerper pleaded guilty to the indictment and was sentenced to imprisonment for one year and three months in the Federal penitentiary at Atlanta, Georgia, the sentence to run concurrently with that imposed upon him in another case. (R. 1.) The defendant Norris pleaded *nolo contendere* (R. 3), and upon the entry of that plea the following stipulation was filed (R. 4–5):

Stipulation of facts relative to defendant Alfred E. Norris

It is agreed by and between E. G. Davis, special assistant to the Attorney General, and Charles Denby, Jr., assistant United States attorney, on behalf of the United States, and Charles I. Thompson, Esq., and Frederic L. Ballard, Esq., representing defendant, Alfred E. Norris, that for all purposes in connection with the above proceedings, the following facts shall be taken to be true and of record herein with like effect as if set forth in the indictment, to wit:

Defendant, Alfred E. Norris, resides at 55 East Seventy-second Street, New York City. His business is that of investment banker.

Joel D. Kerper, the other defendant, for some years prior to the date of the indictment in the above case, conducted at premises known as 341 Walnut Street, Philadelphia, Pa., a business consisting in major part of the sale and transportation incidental to sale, of intoxicating liquors, in violation of the National Prohibition Act. Pursuant to said business, the said Joel D. Kerper supplied a

large number of customers in Philadelphia, New York, and other places. In the course of his business conducted as aforesaid, the said Joel D. Kerper on the dates indicated, made the following shipments by prepaid express from Philadelphia to the said Alfred E. Norris, addressed to him at 55 East Seventy-second Street, New York City. These shipments were labeled as containing the merchandise indicated in each case, and purported to be sent by the shippers named:

Date of shipment	Shipping document number	Alleged consignor	Alleged contents
10/26/26..	800-901	J. Bowen & Co	Syrup.
11/ 5/26..	800-949	National Supply Co	Olive oil.
2 /17/27..	800-942	C. Miller & Co	Grenadine.
6 /14/27..	800-936	M. L. Brown & Co	Olive oil.
6 /20/27..	800-936	M. L. Brown & Co	Olive oil.
7 /11/27..	800-933	Gill & Co	Grenadine.
8 / 5/27..	800-931	D. P. Brown & Co	Olive oil.
9 / 2/27..	800-917	Penn Paint Co	Paint.
10/17/27..	800-921	Penn Paint Co	Paint.
11/17/27..	800-923	J. P. Simpson	Ink.
12/ 9/27..	800-925	Paul J. Brown	Olive oil.
2 / 1/28..	67-901	Penn Supply Co	Grenadine.

In all of the above cases, defendant, Joel D. Kerper, was the true shipper, instead of the fictitious shipper named; and in every instance the package contained an unlawful shipment of intoxicating liquor for beverage purposes; to wit: rye whiskey. Said shipments were made by defendant, Joel D. Kerper to defendant, Alfred E. Norris, to fill orders for rye whiskey given by said Alfred E. Norris, to said Joel D. Kerper over the telephone. Payment for said rye whiskey was made from time to time by Norris to Kerper, either in cash or by check.

> The said rye whiskey was purchased by defendant, Alfred E. Norris, for his own consumption or that of his guests; and he was in no sense a dealer of liquor.

Norris thereupon moved in arrest of judgment, assigning the following reasons (R. 5):

> 1. Upon the face of the record the defendant is not guilty of the crimes charged.
>
> 2. The record shows that defendant merely purchased liquor and the purchase of liquor is not a crime.
>
> 3. The record fails to show in this defendant the degree of affirmative cooperation necessary to render him liable as a conspirator to the substantive offences involved—to wit: the unlawful transportation or false labelling of interstate shipments of liquor.

The motion was denied and Norris was sentenced to pay a fine of $200. (R. 5.) In an opinion contemporaneously handed down (R. 6–8) the District Court "agreed" that the mere purchase of liquor is not an offense under the National Prohibition Act and that the purchaser can not be convicted of aiding and abetting the sale. It furthermore assumed, without deciding, that where there is nothing in the case but a simple sale the purchaser can not be convicted of conspiring with the seller to make the sale, referring in this connection to the statement of this Court in *United States* v. *Katz*, 271 U. S. 354, that an indictment for conspiracy in such a case would be of doubtful validity.

But it distinguished the instant case from one of a simple sale (R. 7) by stating that transportation, a distinct substantive offense under the National Prohibition Act, was not necessarily involved in every sale, as where an owner of property on which liquor is stored sells both the liquor and the property to another who thereafter occupies the premises. The court, therefore, held that the rule laid down in the *Katz case, supra*, was inapplicable to an indictment for conspiracy to transport.

Regarding Norris' contention that the record fell short of proving him a conspirator to commit the substantive offense of transportation the court observed (R. 7–8) that the participation of Norris in the transportation far exceeded mere guiltless acquiescence, in that his repeated orders made him party to an agreement requiring Kerper to transport the liquor.

The court's conclusion was (R. 8):

> (1) that a conviction may be had of a buyer and seller of liquor for conspiracy to transport liquor in a case where the agreement is that the delivery of the liquor sold is to be effected by transportation from the seller to the buyer, and (2) that an order by a purchaser to a bootlegger located at a distance, to deliver liquor followed by transportation, delivery and payment is sufficient evidence of such an agreement.

Upon appeal, the judgment was reversed by the Circuit Court of Appeals, one judge dissenting.

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(R. 17, 18.) In that court, counsel for the Government, with a view to limiting the inquiry to the question whether a charge of conspiracy to transport liquor illegally will lie against the purchaser and the seller of the liquor where the negotiations resulting in the sale contemplated a transportation and a delivery of the liquor, waived the second count in the indictment and that count was not considered by the court.

The considerations which led the Circuit Court of Appeals to conclude that "a sale of liquor involving such transportation as is necessary to effect the delivery to the purchaser, does not subject the purchaser and seller to an indictment for conspiracy to transport" may be summarized as follows: (R. 15–16) (1) Under the Eighteenth Amendment and the National Prohibition Act the purchase of liquor is not an offense; (2) the indictment of a purchaser for conspiracy with the seller is an attempt to make the purchaser liable indirectly for an act which Congress has refused to make an offense; (3) a charge of conspiracy to commit an offense will not lie where a concert of action between the parties charged is necessary to the commission of the substantive crime; (4) in the case of buyer and seller, transportation by the seller is a mere incident of the sale necessary to its completion by delivery to the purchaser, and as a sale necessarily involves an agreement, or concert of action, between the buyer and the seller to effect the purchase, a charge of conspiracy will not lie against the purchaser for agreeing with the seller that the liquor shall be transported

and delivered to the purchaser; (5) under the authorities a purchaser is not guilty of aiding and abetting either the sale or the delivery, and the degree of cooperation to constitute one a conspirator must be more than that involved in the mere aiding and abetting of the commission of the substantive offense.

On application of the Government certiorari was granted by this Court March 3, 1930.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In reversing the judgment of the District Court.

2. In holding that "a sale of liquor involving such transportation as is necessary to effect the delivery to the purchaser, does not subject the purchaser and seller to an indictment for conspiracy to transport."

3. In holding that one who gives orders to a bootlegger in another city to ship him intoxicating liquor for beverage purposes and who receives and pays for the shipments of liquor consigned to him by said bootlegger in response to such orders is not guilty of conspiracy to transport intoxicating liquor in violation of the National Prohibition Act.

4. In holding that the evidence failed to show such a degree of cooperation by Norris in the illegal transportation as to render him guilty as a conspirator to commit that offense.

SUMMARY OF ARGUMENT

The decision of the court below, that the purchase of liquor is not an offense and that the Government was here attempting to make respondent liable in-

directly for an act which was a mere incident in the purchase of liquor, is based upon the conclusions that a charge of conspiracy to commit an offense will not lie where a concert of action between the parties charged is necessary to the commission of the substantive crime; that where liquor is sold by one person to another it is essential that there be a concert of action between the buyer and seller to effectuate the sale, and, therefore, neither can be charged with conspiracy to make the sale; that delivery of the thing sold is essential to consummate the sale; and that, as delivery in the present case could be accomplished only by transporting the liquor to the place of delivery, the transportation was a mere incident of the sale necessary to its completion by delivery, and, therefore, neither party to the transaction is subject to prosecution for conspiracy to bring about such transportation.

These conclusions are erroneous for the following reasons: The case actually does not involve the question whether the purchase of liquor is or is not an offense. The offense charged was not conspiracy to sell liquor but conspiracy to transport it. Under the National Prohibition Act the transportation of liquor without a permit is a distinct offense, whether the transportation be for the purpose of sale at destination, for personal consumption by the transporter, or for delivery to one to whom it has been sold. Actual delivery is not required to complete a sale, nor is transportation essential to effect delivery. Even if it be assumed that the transportation here involved

was essential to delivery and was a mere incident of the sale, it was nevertheless an offense. Unlike the offenses of illegal sale of liquor, bribery, dueling, and the like, which necessarily require for their commission an agreement or concert of action between two persons, the offense of illegal transportation may be committed by one person without any agreement or concert of action with anyone else.

Hence, the rule which forbids indictments for conspiracy in that class of crimes which can not be committed except by agreement of two parties is not to be extended to the transportation of liquor, even though it be incidental to sale, and the dictum in the *Katz case*, to the effect that the embarrassment caused by that rule could be avoided "only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring the agreement of two persons for its completion" supports the indictment in this case.

Respondent's repeated orders telephoned from New York to Philadelphia, and his receipt and payment for the consignments of liquor shipped to him pursuant thereto, leave no room for doubt that the illegal transportations were the result of an agreement, mutual understanding, or concert of action between him and his codefendant.

Lastly, the effect of the opinion of the court below is that ordinary rules of criminal liability for conspiracy will not be invoked against a purchaser of liquor. Such a notion finds no support in the law.

The National Prohibition Act invests a purchaser of liquor with no special immunity.

ARGUMENT

A PURCHASER OF LIQUOR MAY BE GUILTY OF CONSPIRACY TO TRANSPORT THE LIQUOR PURCHASED BY HIM AND THE CONVICTION IN THIS CASE SHOULD HAVE BEEN SUSTAINED

While the court below holds that the purchase of liquor is not an offense under the National Prohibition Act and speaks of this prosecution as an attempt to make the respondent liable indirectly for an act which was a mere incident in the purchase of liquor, we are not here concerned with the legal position of a simple purchaser. The case actually does not involve the question whether the purchase of liquor is or is not an offense.

The court reached its decision upon the following line of reasoning: That a charge of conspiracy to commit an offense will not lie where a concert of action between the parties charged is necessary to the commission of the substantive crime; that where liquor is sold by one person to another it is essential that there be a concert of action between the buyer and seller to effectuate the sale, and, therefore, neither can be charged with conspiracy to make the sale; that delivery of the thing sold is essential to consummate the sale, and that, as delivery in the present case could be accomplished only by transporting the liquor to the place of delivery, the transportation was a mere incident of the sale

necessary to its completion by delivery to the purchaser, and, therefore, neither party to the transaction is subject to prosecution for conspiracy to bring about such transportation.

We submit that this reasoning is fallacious. The charge against Norris is not conspiracy to *sell* liquor but conspiracy to *transport* it, and under the facts in this case rests not upon his position as purchaser in a single transaction but as a regular patron of the bootlegger Kerper, each purchase requiring distant transportation following the purchase. Transportation is not necessarily involved in every sale of liquor and it is made a distinct substantive offense under the National Prohibition Act. Under Section 3, Title II, of the Act, the offense is committed when the transportation is effected in any manner or for any purpose not authorized by that Title. The term is there used in its ordinary sense. *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100. As was said by this Court in that case (pp. 121–122):

> Some of the contentions ascribe a technical meaning to the words "transportation" and "importation." We think they are to be taken in their ordinary sense, for it better comports with the object to be attained. In that sense transportation comprehends any real carrying about or from one place to another. It is not essential that the carrying be for hire, or by one for another; *nor that it be incidental to a transfer of the possession or title.* If one carries in his own conveyance for his own purposes it is transportation no less than

> when a public carrier at the instance of a consignor carries and delivers to a consignee for a stipulated charge. (Italics ours.)

See also *Grogan* v. *Walker & Sons*, 259 U. S. 80, 90; *Corneli* v. *Moore*, 257 U. S. 491, 496–497.

It is immaterial, therefore, by whom or for what purpose the transportation takes place if not authorized by the Act. Whether it be for the purpose of sale at destination, for personal consumption by the transporter, or for delivery to one to whom it has been sold, the offense is nevertheless committed. In the present case, it is conceded that the liquor was transported and for beverage purposes, and the position of the Government is that Norris was involved in such unlawful transportation. As the transportation was not authorized by Title II of the National Prohibition Act, it was clearly an offense under Section 3.

We submit that the language of this Court in *United States* v. *Katz*, 271 U. S. 354, 355, tends to support the conspiracy charge in this case. The Court said:

> The overt act charged in each indictment was the sale of whisky by one defendant to the other. This is an offense under the National Prohibition Act; but as the defendants in each case were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity. Compare *United States* v. *N. Y. C. & H. R. R.*,

146 Fed. 298; *United States* v. *Dietrich*, 126 Fed. 664; *Vannata* v. *United States*, 289 Fed. 424, 427. This embarrassment could be avoided in an indictment for a criminal conspiracy only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring the agreement of two persons for its completion. See *Chadwick* v. *United States*, 141 Fed. 225.

Unlike the offense of illegally selling liquor, which necessarily requires for its commission an agreement or concert of action, tacit or otherwise, between buyer and seller, the offense of transportation may be committed by one person without any agreement or concert of action with anyone else. See *Chadwick* v. *United States* (C. C. A. 6th), 141 Fed. 225, 236. The rule that a charge of conspiracy to commit an offense, such as illegal sale, bribery, bigamy, adultery, dueling, and the like, will not lie where the only persons charged are those whose agreement or concert of action is essential to the commission of the substantive crime, has no application, therefore, to a charge of conspiracy to transport in violation of law. Irrespective of purchase or sale, one may transport by himself, or from himself at one point to himself at another point.

It is this extraneous element which Norris tries to merge into purchase and sale, and which the court below does merge, with the statement that the Government is here attempting to maintain a prosecution not contemplated by Congress. The additional

feature of transportation involved in the transactions in this case is the very ingredient which this Court excepted from the rule announced in the *Katz case, supra*. Unlawful transportation is a substantive offense against the laws of the United States and, so far as its relation to sale and delivery is concerned, is an act the performance of which does not require the agreement of two persons. A sale could be agreed upon, the transportation completed, and the sale then repudiated at the delivery point. The sale would thus not be completed, but the transportation would be.

Recognising the force of the foregoing principles, and in order to avoid their effect, the court below adopted the theory that the purchaser is not chargeable with the transportation of liquor in this case because it was a mere incident of the sale of the liquor to him. This conclusion was based upon the further holdings of the court that delivery of the liquor was required to complete the sale and that the transportation in question was essential to effect such delivery. It is settled, however, that actual delivery to the purchaser of the article sold is not essential to a completion of the sale. There is an obligation to deliver under a sale, but no formal ceremony is necessary, nor is manual delivery required. Thus, it has been held that the seller fulfills his obligation where the goods are placed at the buyer's disposal so that he may remove them without legal obstruction (*Glasgow* v. *Nicholson*, 25 Mo. 29; *Davis* v. *Alpha Portland Cement Co.*, 134 Fed. 274), or where the goods are at a dis-

tance from the place of sale and the buyer is told to go and take them (*Patrick* v. *Meserve*, 18 N. H. 300).

Moreover, even if it be conceded that a sale can not be consummated without an actual delivery of the thing sold, it is nevertheless plain that such delivery may be made without a transportation. This is illustrated by the examples given by the District Court of the case where a bootlegger, without any previous understanding or knowledge on the part of the purchaser, takes liquor to his house, sells it to him and leaves it there; as well as of the case where liquor and the premises upon which it is stored are sold together and the purchaser moves in upon the seller's moving out. Upon placing the consigned liquor in charge of the express company in Philadelphia for transportation to Norris in New York, Kerper satisfied the usual rule as to delivery required of the seller. The facts in this case disclose no definite prior arrangement respecting the mode of transportation or delivery. In *Magruder* v. *Gage*, 33 Md. 344, 348, it was said that where the contract of purchase is silent as to the person or mode by which the goods are to be sent, a delivery by the vendor to a common carrier in the usual and ordinary course of business transfers the property to the vendee. In Hutchinson on Carriers, 3d Ed., Sec. 1320, it is stated that "the law will presume, when nothing appears to the contrary, that the consignee is the owner of the goods, and that the contract for their transportation was made with him as such owner." See also, *United States Mail Line* v. *Carrollton Furni-*

ture Mfg. Co., 101 Ky. 658; *Whiting* v. *Farrand*, 1 Conn. 60, 63. Under the authorities and on the facts in this case, transportation was not necessarily incidental to or absolutely required for completion of the delivery, but was a separate and distinct undertaking in addition to the completed sale.

But even if it were assumed that the transportation here involved was, as the court below held, a mere incident of the sale, it is nevertheless plain that such transportation would be an offense under Section 3, for, as indicated by the decisions of this Court heretofore cited, that offense is committed by any transportation not authorized by Title II of the Act. Hence, we submit, the rule which forbids indictments for conspiracy in that class of crimes which cannot be committed except by the agreement of two parties is not to be extended to the transportation of liquor, even though it be incidental to a sale. The dictum in the *Katz case*, to the effect that the embarrassment caused by that rule could be avoided "only if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient in addition to the sale, not requiring the agreement of two persons for its completion" would seem to be plainly applicable to an indictment for conspiracy to transport.

We submit also that the Circuit Court of Appeals erred in holding further that the facts failed to show such a degree of cooperation by Norris in the illegal transaction as to render him guilty as a conspirator to commit that offense. As said by the trial court,

Norris' connection with the illegal transaction was decidedly more than the "degree of cooperation that would not amount to a crime" referred to by this Court in *United States* v. *Holte*, 236 U. S. 140, 144. Norris did more than know and acquiesce in the transportation. He also did more than merely let Kerper know that he was in the market for liquor. By his repeated orders of whiskey telephoned from New York to Philadelphia he became party to an arrangement which required Kerper to ship the liquor and he insured service by paying as promised. Thus, he not only solicited, but bound, Kerper, by such obligation as the character of the transaction permitted, to commit the offense. The twelve shipments of liquor by Kerper to Norris supply abundant evidence of the relationship between the two. The one desired liquor; the other the profits accruing from its sale.

A manual exchange of the commodity was not practicable because of the intervening distance. The law prohibiting the transportation of liquor was an obstacle to be overcome. To circumvent possible detection and prosecution, deception was resorted to respecting both the package contents and the consignor. Even if it be assumed that the precautions taken did not spring from consultation, discussion or agreement between the two, and that Kerper alone decided upon the details to be employed in averting discovery, Norris' entanglement in the enterprise was

no less complete. No formal agreement, of course, was necessary to constitute the conspiracy; a tacit understanding was sufficient. *United States* v. *Olmstead*, 5 F. (2d) 712, 714. See also, *Williamson* v. *United States*, 207 U. S. 425, 449. Norris repeatedly accepted from the express company packages bearing false labels and shipped by fictitious consignors. He continuously deceived the carrier by failing to disclose the true contents and consignor, well knowing that the transportation would not be undertaken if the actual facts were disclosed. He violated Sections 14 and 15, Title II, of the National Prohibition Act by thus inducing the carrier to ship packages of liquor without notifying the carrier of the true nature and character of the shipment, and by receiving from the carrier packages containing liquor upon which appeared statements known to him to be false. All these things were done by him to effect the transportation to him of the liquor. There would appear to be no room for doubt that the illegal transportation was the result of agreement, mutual understanding, and concert of action between Norris and his codefendant Kerper.

In its brief in opposition to the petition for a writ of certiorari in this case, respondent relied on the cases of *Becher* v. *United States* (C. C. A. 2d), 5 F. (2d) 45, and *La Rosa* v. *United States* (C. C. A. 4th), 15 F. (2d) 479. The *Becher case* was a prosecution for conspiracy involving the importation of liquor, its storage in bonded warehouses, its withdrawal on forged per-

mits, and the procuring of bonds of indemnity against liability for import duties. Birnbaum, one of the conspirators, contended that he was merely a buyer of some of the imported liquor and that, as nothing was proved against him except that the liquor had been delivered to him and found in his cellar, there was no proof that he was a conspirator. In this connection the court said (p. 50):

> We concede at once that merely as buyer he was not a party to the scheme in any criminal sense, that on the contrary the prosecution was bound to involve him in the plan as a whole in some other sense; * * *.

The respondent contended that this was a decision against the Government's contentions in this case. We submit that the case can not be so construed.

In *La Rosa* v. *United States*, *supra*, La Rosa was convicted of conspiracy to transport, etc., intoxicating liquor. The appellate court held that the trial court had erred in its charge to the jury, and it refused to go into the question whether a certain understanding between La Rosa and others would or would not sustain a charge of conspiracy to transport. The case is therefore not authority against the propositions advanced by the Government in this case.

Finally, the effect of the opinion of the court below seems to be that ordinary rules of criminal liability for conspiracy may not be invoked against a pur-

chaser of liquor. Such a notion finds no support in the law. Whether or not the National Prohibition Act makes the act of purchase a crime in itself (a question not involved in this case), it manifestly does not invest the purchaser with any *special immunity* from the consequences of doing those things which beyond question are made criminal. The mere fact that one is a purchaser gives him no license to violate the law with impunity. If one carries liquor from place to place he is guilty of transportation; if he has it shipped into this country he is guilty of importation; and while he keeps it he is guilty of possession. This is so whether the person who transports or imports or possesses is a purchaser or not. If a purchaser agrees and cooperates with the seller to have the liquor transported not to him but to a friend, it seems clear that he is guilty of a conspiracy to transport it. So, too, if one acts as agent for a purchaser in procuring transportation. We submit that there is no reason why the fact that the agreed transportation is to himself makes him less guilty. If a purchaser may arrange to have liquor shipped to him in New York, as in this case, he may arrange to have it transported across the continent to California. Or he may purchase liquor in Europe or Canada and agree that it shall be delivered in this country, yet he cannot be convicted of conspiracy to import.

CONCLUSION

The decision of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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FILE COPY

No. 555.

OCTOBER TERM, 1929.

Supreme Court of the United States

THE UNITED STATES OF AMERICA, Petitioner,

v.

ALFRED E. NORRIS.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929. No. 555.

The United States of America, Petitioner,

v.

Alfred E. Norris.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

ARGUMENT.

It should be noted at the outset that the reason assigned in the petition for the invoking of the discretionary jurisdiction of this Court, to review this case on writ of certiorari, is that the question involved "is one of great public interest and importance." (Petition, p. 10.) It is not alleged that the decision of the circuit court of appeals is "in conflict with the decision of another circuit court of appeals on the same matter," that being one of the "character of reasons" which this Court has formulated as a guide for determining whether there are sufficient "special and important reasons" for the Court's exercising its discretion in granting the writ. Rule 38 (5).

Such an allegation could not properly be made, since by this decision the circuit court of appeals has simply placed itself in accord with two other circuit courts of appeals who disposed of the same identical question in exactly the same way. Moreover, the decision in this case lays down no new doctrine whatever and has no effect on the other matters referred to in the petition; and all of the general law in both the state and federal courts points to the same decision which the circuit court of appeals has made.

The petition also states (p. 11) that the decision has been given wide publicity; that unless corrected, it will have a very detrimental effect upon prohibition enforcement; that the reasons advanced in the opinion might equally prevent successful prosecution of a purchaser for a conspiracy to import liquor; and that the court has narrowed the scope of the Conspiracy Act, rendering it inapplicable to cases to which it properly applies. The decision has had no such effect, as we later show.

Of course, the question of publicity is immaterial; this Court cannot be expected to invoke its discretionary jurisdiction in a particular case because the decision of a circuit court of appeals has provided grist for the reportorial mill. It is, however, not inapropos to note that the reason why publicity followed the decision was because it was of interest to the public to know that the Department of Justice had failed in its attempt to persuade the judiciary to make a change in the federal criminal law beyond the legislative intent. The case had no public in-

terest on the ground that the decision marked a change in the law, because there had been no change.

The fact that it made no change clearly shows that the decision, if it stands, will not, as the petition alleges, "have a very detrimental effect" upon prohibition enforcement. Quite the contrary. This decision works no change in enforcement. The Prohibition Act has been administered for ten years without there ever having been one single conviction of a purchaser such as Norris for conspiracy to transport. It is, therefore, difficult to see how this decision can have any detrimental effect upon that enforcement, when the decision allows that enforcement to remain without change as it has always been. If the state of the law of criminal conspiracy, as shown by this case, is in such condition that it has detrimental effect on prohibition enforcement, then that same condition has existed as long as there has been prohibition to enforce. This decision has nothing to do with it. What the Department of Justice attempted to do in this case was to effect a change in the law and its enforcement, not to maintain its *status quo;* that attempt properly failed; to contend now that to allow this decision to stand will have a detrimental effect on enforcement, and to ask for reversal, is to plead for a change which looks to the future, but the making of such changes is the province of the legislature and not of the executive or judiciary. This is particularly true of the federal criminal law, which is purely a matter of legislation.

We do not see that there is any occasion for the fear that the reasons advanced by the circuit court of appeals, for its decision in this case, might prevent successful prosecutions of purchasers for a conspiracy to import liquor. We cannot conceive of any court relying upon the circuit court's decision in this case as a reason for frustrating a successful prosecution for conspiracy to import, or any other kind of conspiracy, when a case of conspiracy can be made out. The decision of this Court in *Ford* v. *United States*, 273 U. S. 593, clearly shows that a successful prosecution against a purchaser for conspiracy to import liquor can be maintained where the purchaser does more than Norris did and actually conspires at the importation. The decision in the instant Norris case throws no kind of immunity around the purchaser just because he is a purchaser. A conspirator remains a conspirator even though he also happens to be a purchaser. As the circuit court of appeals said in its opinion (R. 22), "There would be no difficulty in conceiving a set of facts which * * * would sustain * * * an indictment [for conspiracy to transport], notwithstanding the conspiracy existed between the seller and the buyer." The decision in this case simply is that merely being a purchaser does not carry with it the felony of being a party to a conspiracy to transport the liquor purchased when all that is done is that the *seller* delivers to the purchaser the liquor sold him.

Of course, if the purchaser goes further and does

more, it is entirely possible that he may make himself a conspirator. There are many cases where a defendant has been properly convicted of conspiracy, even though he happened also to have been a purchaser. *Becher* v. *United States*, 5 F. (2d) 45, is a good example. We comment on that case below at p. 6.

The decision of the circuit court of appeals in this case in no way narrows the scope of the Conspiracy Act so as to render it inapplicable to cases to which it would apply were it not for this decision. Since the decision has no general applicability beyond cases on the same facts, and neither overrules any prior cases nor makes any new law, it cannot have the effect of narrowing the Act.

In attempting to divert attention from the fact that this case is an attempt, by indirection, to make a crime out of a necessary incident to purchase (which is not a crime), the petitioner states that this case actually does not involve the question whether the purchase of liquor is an offense. (Petitioner's Brief, p. 13.) That is true, in the sense that this case is not on indictment for purchasing. But what it does involve is whether the purchaser of liquor is guilty of an offense, when all he did was purchase.

The question which this Court is asked to review has now been disposed of by the circuit courts of appeals for the second, third and fourth circuits, and all of them disposed of it in exactly the same way. In the face of such unanimity of opinion, it is difficult to suppose that all of them are wrong.

The question first arose in *Becher* v. *United States*, 5 F. (2d) 45 (2d C. C. A. 1924), a case of conspiracy, including conspiracy to transport. There had been a comprehensive plan involving the importation of liquor, its storage in bonded warehouses, and its withdrawal on forged permits and the procuring of bonds of indemnity against liability for import duties. One Birnbaum was admittedly in some way involved. He contended that he was merely a buyer of some of the imported liquor and that as nothing was proved against him except that *the liquor had been delivered to him* and found in his cellar, there was no proof that he was a conspirator. Judge Learned Hand, speaking for a unanimous court, said at page 50:—

> "We concede at once that merely as *buyer* he was not a party to the scheme in *any* criminal sense, that on the contrary the prosecution was bound to involve him *in the plan as a whole in some other sense.*" (Italics ours.)

Although some of the cases of this particular imported liquor were found in his cellar, with the marks obliterated,

> "Still all this was indeed equally consistent with his being a large buyer and did not show his complicity."

Thus we see that that circuit court of appeals expressly rejected the doctrine which the government advances here. Had that court agreed with such doctrine it would have simply said that even if the

facts were as Birnbaum contended, the result would nevertheless be that he had committed the crime of conspiring to illegally transport because the liquor he had bought had been delivered to him in fulfillment of his purchase. On the contrary, the court was at pains to go much further and show, through proofs of other acts (not of interest to us here because nothing of the sort is involved in the instant case), that Birnbaum was in complicity with the others and had himself acted in other ways in furtherance of the crimes which they all had conspired to commit.

The question next arose in *La Rosa* v. *United States,* 15 F. (2d) 479 (4th C. C. A. 1926). La Rosa was indicted, with others, for conspiracy, including conspiracy to transport. The only understanding La Rosa had with the others was that he would buy certain whisky from them and show them how to get it to his garage. He met them in his car outside the city where his garage was located, they being in their car with the whisky, and he piloted them, driving his own car, they following in theirs, to his garage where they left the whisky. Circuit Judge Rose, speaking for a unanimous court, said that La Rosa aided and abetted the transportation; but he added, at p. 481:—

> "We shall not go into the nice inquiry as to whether such an understanding would or would not suffice to sustain a charge that he [La Rosa] had entered into a conspiracy with them for the unlawful transportation of the liquor. If it does, seemingly anyone who agrees to buy liquor from

> a bootlegger, and tells him how to get it to his back door with it, commits an offense punishable by imprisonment in the penitentiary for as much as two years and by a fine of $10,000."

Judgment of conviction for conspiracy was reversed. The court sarcastically rejected the precise contention which the petitioner now renews in this Court. Yet the *La Rosa* case presented a stronger case for the Government than this case does, because La Rosa did much more than Norris did. The court said that La Rosa aided and abetted the transportation but even that was not sufficient to cause it to consider the question of the conspiracy to transport. The question in this case was squarely raised in the *La Rosa* case, both under the indictment and on the facts proved, so the refusal of that court "to go into the nice inquiry" is a clear holding that the Government's position was too tenuous to merit the serious consideration of that court.

Moreover, in both the *Becher* and *La Rosa* cases, the liquor purchased was in such large quantities that, as Circuit Judge Rose said in the *La Rosa* case, p. 481:

> "From the quantity and character of the intoxicants found, it might be assumed that La Rosa expected to sell the larger part of them."

The *Becher* and *La Rosa* cases were, therefore, much stronger cases than this case against Norris who purchased "for his own consumption or that of his guests; and he was in no sense a dealer of liquor." (Stipulation of Facts, R. 8.)

The circuit court of appeals for the third circuit, when the instant case was considered by it, was also of the opinion not only that there was no legal merit in the contentions of the Department of Justice but also that the position of the Department was open to criticism on other grounds. The court said (R. 24):

> "While the seller of liquor, who delivers it to the purchaser, is liable under the law both for the sale and transportation, the purchaser to whom the goods are delivered is chargeable with neither the purchase nor the transportation. It thus appears that while the legislative department of the Government has deliberately and intentionally made the purchaser of liquor guiltless of any offense under the prohibition law the executive department of the Government seeks here, by indirection, to make of the same fact, namely, the purchase, a crime subjecting the purchaser to a maximum fine of $10,000. and imprisonment for a term of two years. Such a situation is scarcely conceivable, and yet that is the position of the Government."

The petitioner need not labor the cases of *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100. *Grogan* v. *Walker & Sons,* 259 U. S. 80, and *Corneli* v. *Moore,* 257 U. S. 491 as holding that such transportation as there was in this case was in violation of the National Prohibition Act. We admit it. The circuit court of appeals so said (R. 24) in the paragraph just quoted. The seller was guilty not only of an illegal sale but also of an illegal transportation; and Kerper (the seller) has been convicted and served his sentence for

it. Thus the doctrine of the *Cunard* and similar cases has had full recognition and application in this very transaction.

The petitioner points to certain language in *United States* v. *Katz,* 271 U. S. 354-355, which, he says, "tends to support" the conspiracy charge. The *Katz* case was an earlier unsuccessful attempt by the Department of Justice to fasten the purchaser, by indirection, with a crime. The buyer and seller were indicted for conspiracy to sell whisky without making a record of the sale. The indictment was quashed by the district court, 5 F. (2d) 527, on the ground that the Prohibition Act does not require bootleggers to make records of sales. The case came to this Court on writ of error (not writ of certiorari) under the provisions of the Criminal Appeals Act of 1907; and it was affirmed, 271 U. S. 354. Mr. Justice Stone, speaking for this Court, pointed out, at p. 355, that the overt act charged was the sale of whisky by one defendant to the other, which is an offense under the National Prohibition Act; but that as the defendants

> "were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity."

He went on to point out that:—

> "This embarrassment could be avoided in an indictment for a criminal conspiracy *only* if the

buyer and seller were charged with conspiring to commit a substantive offense having an ingredient *in addition* to the sale, *not requiring* the agreement of two persons for its completion." (Italics ours.)

It is obvious that the transportation which does no more than effect the delivery of the goods sold, and which is, therefore, an essential ingredient of the sale, is not what Mr. Justice Stone, in the *Katz* case, called "an ingredient in addition to the sale, not requiring the agreement of two persons for its completion." The only transportation involved in the present case is such delivery—transportation and nothing more.

The "embarrassment" mentioned by Mr. Justice Stone cannot be avoided in this case. Judge Kirkpatrick in the District Court and the petitioner here attempt to avoid it by pointing to the two hypothetical cases supposed by that judge (R. 11): (*a*) The itinerant bootlegger; and (*b*) the sale of premises containing liquor, followed by the seller moving out and the buyer moving in. They conclude that transportation is not necessarily involved in every sale. It is to be remembered, however, that delivery is necessarily involved in every sale, even including those two hypothetical cases. And where the transportation is no more than delivery—transportation which effects and completes an essential ingredient of the sale itself, and is not in addition thereto, the fact that transportation is made a distinct substan-

tive offense by the National Prohibition Act is beside the point. Their argument overcomes but one of the two obstacles pointed out by Mr. Justice Stone in the *Katz* case.

The petitioner's brief is absolutely wrong when it says (p. 16) that the circuit court of appeals

> "adopted the theory that the transportation of liquor in this case was not a transportation prohibited by Section 3, but was a mere incident of the sale of the liquor."

The circuit court fully recognized that the seller was liable for both the sale and the transportation. (R. 24.) This very seller has been convicted and served his sentence for it. (See also p. 9 above.) That court said that in the case of seller and buyer the delivery—transportation was a mere incident in the sale and necessary to its completion; that since it was an essential element of the sale which the seller had to perform, and both buyer and seller had to agree in effecting the purchase, there was no conspiracy at such delivery—transportation. (R. 25.)

To answer all this, the petitioner argues that actual delivery to the purchaser of the article sold is not essential to a completion of the sale. (Petitioner's Brief, 17.) The cases of *Glasgow* v. *Nicholson*, 25 Mo. 29, *Davis* v. *Alpha Portland Cement Co.*, 134 Fed. 274, and *Patrick* v. *Meserve*, 18 N. H. 300 are cited in support. Those cases do not hold that the seller is not under the obligation to deliver. In all of them, the courts were simply dealing with the re-

spective contractual obligations of buyer and seller with respect to the means of effecting delivery according to the particular contracts which they had made. In all of them the duty of the seller to deliver the goods sold was recognized. There is no doubt as to such a familiar duty. See 2 Williston on Sales, 2d ed., 1908. The question often arises as to when the title of goods contracted to be sold passes to the buyer, and that may often be at a time different from the time of the delivery of the goods. Such questions are entirely immaterial for our purposes although they may be very important in cases of fire, bankruptcy, levy of execution and the like. The fact remains that in all cases of sales there must always be a delivery.

We are, of course, fully conscious that there may be and is much transportation of liquor which is not a necessary incident to a sale and at which two or more people, upon a showing of the necessary degree of cooperation and concert, could be held as conspirators under the Conspiracy Act. Where such are the facts involved in any such case, then it is very pertinent there that the Prohibition Act makes transportation a distinct substantive offense. Our point is that where the only transportation involved is such transportation as is the normal and necessary incident to the completion of a sale and purchase, the purchaser can no more be held for conspiracy at such delivery—transportation than for conspiring at the sale itself.

It is obvious that before one charged with conspiracy can be found guilty of that crime, he must be shown to have contributed, in the required degree, to the concerted action. The respondent Norris did not. The sum and substance of his contribution was that which is involved in the mere act of purchase; that which is afforded by every purchaser; and no more.

It will not be disputed that there may be a degree of cooperation which is insufficient to meet the requirements of conspiracy. In *United States* v. *Holte,* 236 U. S. 140, 144, Mr. Justice Holmes had occasion to discuss the degree of cooperation requisite to the crime of conspiracy and in the course of his discussion, seeking for an example of cooperation which all would recognize as obviously insufficient, he said

> "there may be a degree of cooperation that would not amount to a crime, as where it was held that a purchase of spirituous liquor from an unlicensed vendor was not a crime in the purchaser, although it was in the seller. *Com.* v. *Willard,* 22 Pick. 476."

The *Becher* and *La Rosa* cases, the instant case, and the principle just quoted from the *Holte* case, had back of them a long and uniform line of cases holding that the part played by the purchaser in an unlawful sale of liquor does not render him in any way criminally liable. The question has been so decided many times under state prohibition and licensing laws as well as under federal statutes prohibiting the sale of liquor to Indians. Such cases have uniformly held

that the purchaser commits no crime, whether such cases have been on indictments charging the purchaser with an alleged crime, or have been cases where the question was whether the purchaser had committed a crime and so would incriminate himself if he gave testimony against the seller. The scope of such latter cases is all-inclusive because if the proposed witness (the purchaser) had committed *any* crime in connection with the purchase, his testimony would incriminate him. Such cases, therefore, have necessarily passed upon the question in the instant case.

Com. v. *Willard,* 22 Pick. 476 (Mass. 1839), is an early and leading case which has always been followed. Chief Justice Shaw said, at p. 477:—

> "But the Court are of opinion, that the witness would not be liable to *any* prosecution as such purchaser, and therefore would not criminate himself or expose himself to punishment by such a purchase. No precedent and no authority has been shown for such a prosecution, and no such prosecution has been attempted within the knowledge of the Court, although a similar law has been in force almost from the foundation of the government, and thousands of prosecutions and convictions of sellers have been had under it, most of which have been sustained by the testimony of buyers. That such a prosecution is unprecedented, shows very strongly what has been understood to be the law upon this subject."

And he added, at p. 479:—

> "The statute imposes a penalty, upon any person who shall sell. But every sale implies a

purchaser; there must be a purchaser as well as a seller, and this must have been known and understood by the legislature. Now, if it were intended that the purchaser should be subject to *any* penalty, it is to be presumed, that it would have been declared in the statute, either by imposing a penalty on the buyer in terms, or by extending the penal consequences of the prohibited act, to all persons aiding, counselling or encouraging the principal offender. There being no such provision in the statute, there is a strong implication, that none such was intended by the legislature." (Italics ours.)

That court concluded that the purchaser committed no offense at all.

A full discussion of the entire subject is contained in *Lott* v. *United States,* 205 Fed. 28 (9th C. C. A. 1913), where the purchaser, an Indian, was indicted for soliciting and inciting the seller to commit the crime of furnishing liquor to an Indian who was none other than the purchaser Lott, himself. The circuit court of appeals reversed a conviction, with instructions to dismiss the complaint. The court said:—

"What was the intention of Congress in enacting the law? Was it intended to make unlawful the act of purchasing intoxicating liquor? If the answer is in the negative, it follows that an Indian who attempts to purchase intoxicating liquor, or solicits another to sell it to him, is guilty of no offense." (P. 31.)

"Congress must have been aware of the universal ruling of the courts that under laws

prohibiting the sale of intoxicating liquors the purchaser committed *no* offense. We are not justified in assuming that, in so amending the law and increasing the punishment for its violation, it was the intention to make criminal, and subject to punishment as a crime, the act of purchasing or attempting to purchase intoxicating liquors, which theretofore had been innocent acts. If such had been the intention of Congress, it is but reasonable to presume that it would have been expressed in such clear terms as to admit of no doubt. In the absence of such express legislation, we are authorized to presume that Congress deemed it of greater advantage to the government in enforcing the law to leave the Indian who might succeed in purchasing liquor in Alaska free to testify in the courts against the seller thereof, than to punish the Indian for purchasing, or offering to purchase, the same." (p. 51-2.) (Italics ours.)

With this old and universal line of cases back of it, the instant case could not have been properly decided in any other way.

The cases dealing with "entrapment" by federal agents also confirm the decision of the circuit court of appeals in this case with respect to the degree of cooperation necessary to constitute one a conspirator. It is the universal rule that a defendant will not be held guilty in a criminal case where the agents of the Government have induced him to commit the crime or conspired with him for its commission. It is the customary practice of Government agents, in

order to get evidence, to make purchases of the prohibited goods, *e. g.,* drugs or liquors, from suspected unlawful vendors. In such cases the defense has been repeatedly interposed that the Government agents by so doing entrapped, induced or conspired with the defendant in such a way and to such an extent as to give him the benefit of the entrapment rule. And it has been uniformly held that this defense is not good in cases where the agents merely purchased goods delivered to them, for the reason that the mere purchase is not such an entrapment, inducing or conspiracy. See, for example, *Lucadamo* v. *United States,* 280 Fed. 653 (2d C. C. A. 1922); *Rossi* v. *United States,* 293 Fed. 896 (8th C. C. A. 1923), and *DeLong* v. *United States,* 4 F. (2d) 244 (8th C. C. A. 1925).

The *Rossi* case was one of criminal contempt for violating an injunction against the transportation of liquor as well as against its sale; the court held that the conduct of one who "called up the defendant on a phone and ordered the delivery of 'six,' " falls "far short" of such inducing or soliciting of the delivery as amounts to entrapment. A fortiori, such conduct falls far short of the requirements of conspiracy.

All the pertinent cases, of which those cited by us are leading examples, clearly show that Norris did not furnish such degree of cooperation as is an essential prerequisite to a conviction for a criminal conspiracy. In doing no more than ordering the whisky and paying for it he did nothing which made him a felon.

As we have pointed out above (p. 4), the circuit court of appeals did not at all hold that the ordinary rules of criminal liability for conspiracy may not be invoked against a purchaser of liquor, as the petitioner urges. (Petitioner's Brief, 18.) On the contrary, the court said that it is not difficult to imagine a set of facts which would constitute a conspiracy even between buyer and seller. This decision gives the buyer no special immunity. It simply holds that purchasing is not conspiring at the transportation of the liquor which is merely the delivery of that which is sold. The decision has no application to other phases of the law of conspiracy and in no way narrows its proper application in liquor cases or elsewhere. The Government cannot point to any case, decided at any time, in which a defendant has been held guilty of conspiring at the transportation of any goods, the sale of which was illegal, when all such defendant did was purchase the goods delivered. If this decision is allowed to stand, the law remains unchanged. If it is disturbed, a change in the law will be effected. There are no common law offenses against the United States, and for an act to be criminal, it must be plainly and unmistakably within the provisions of an Act of Congress, and unless it is, it cannot be treated by the federal courts as a crime. If the Department of Justice does not like this branch of the law as it finds it, it must go to Congress to get it changed and not to the federal courts who cannot go beyond the legislative enact-

ment. There is no doubt that Congress is fully cognizant of the situation.

We respectfully submit that the petition for the writ of certiorari should be denied.

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CHARLES ELMORE C

No. 555.

OCTOBER TERM, 1929.

IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA, Petitioner,

v.

ALFRED E. NORRIS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929. No. 555.

The United States of America, Petitioner,

v.

Alfred E. Norris.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

SUMMARY OF ARGUMENT.

1. It is the clear intent of Congress that the purchaser of intoxicating liquor for beverage purposes should not be penalized. A conviction in this case for conspiracy to transport would frustrate that legislative intent because all Norris did was purchase.

2. There can be no conviction here for conspiracy to transport because the only transportation involved was the delivery of the liquor sold and was an essential element of the sale itself and not an ingredient in addition to it.

3. Norris' act of purchase was not a sufficient degree of cooperation to meet the requisite for concerted action necessary to make out a conspiracy.

ARGUMENT.

POINT 1:—A CONVICTION IN THE PRESENT CASE WILL DEFEAT THE LEGISLATIVE INTENT THAT THE PURCHASER OF INTOXICATING LIQUOR FOR BEVERAGE PURPOSES SHOULD NOT BE PENALIZED.

The respondent Norris bought whisky from a bootlegger. Kerper, the bootlegger, shipped the whisky to Norris by prepaid express, to fill Norris' orders for rye whisky which were given over the telephone, just as any commodity is purchased over the telephone. Norris paid for the whisky. That is the sum total of what he did. The Government contends that the simple act of purchase involved Norris in a conspiracy; that by virtue of it alone, and without the addition of any other act or agreement on his part, he and the bootlegger conspired to transport liquor in violation of the National Prohibition Act (of Oct.

28, 1919, sec. 3, title II, c. 85, 41 Stat. 305, 308). In the words of the Circuit Court of Appeals, "Such a situation is scarcely conceivable, and yet that is the position of the Government" (R. 15).

There were twelve separate purchases. The Government now suggests for the first time that the fact that there were twelve, rather than a single purchase, affects the question whether Norris was a conspirator. It is sufficient to say that the Gov rnment limited itself to, and asked the Circuit Court of Appeals to decide, the simple question, whether the purchaser in a single sale, by virtue of his purchase, conspires with the seller to transport, when delivery of the liquor sold is effected by transportation from the seller to the purchaser. That is the question which the Circuit Court decided and it is that question which is here for review.*

* The Circuit Court stated the question submitted by the Government and decided by it as follows (R. 13):—

> "Their clear purpose was, as frankly stated and repeated by the Government's counsel in their argument, to bring before the Court for decision the single question whether a buyer and a seller of liquors, where transportation and delivery is made in pursuance of the sale, can be together indicted for a conspiracy to transport."

The review here is confined to this question. The Government cannot now submit any different or broader question (*Great Northern Ry. Co.* v. *United States*, 208 U. S. 452, 470, 471). This matter is discussed more fully under Point 3 at page 29 ff of this brief, where we deal with the degree of co-operation requisite to a conspiracy.

The Government states that this case actually does not involve the question whether the purchase of liquor is an offense (Brief, p. 12). But, plainly it does. It involves the question whether such purchase is the offense of conspiracy to transport.

As this question turns solely upon Federal statutes, it is to be answered by finding the legislative intent. To this end, it is important to examine the legal background furnished by earlier regulatory and prohibitory statutes and the cases construing them.

When Federal prohibition was adopted most of our population lived under laws which had always recognized the manufacture, sale and use of intoxicating liquor as lawful. Into that field, we boldly entered with legislation which was not only prohibitory but penal. The step was drastic but it was not hasty and ill-considered. All recognized that this tremendous change could not be made over night.

There was an abundant experience on which to draw. For many years there had been state laws licensing sales and Sunday and election-day prohibitory laws. Local option was tried as early as 1832. The first state or territorial prohibitory law was enacted in 1843. There were also many Federal statutes dealing with liquor prohibition in territorial, war and Indian legislation, going back as far as 1802. Under all of these different kinds of enactments, which forbade or regulated the sale of liquor, the question had often arisen as to whether the purchaser com-

mitted *any* offense by virtue of his purchase. It was uniformly held that he did not,* in the absence of an express and unequivocal statutory penalty for purchasing.

The cases which have involved the status of the purchaser have approached the question from many angles, *e. g.*, whether the purchaser was an accomplice or principal, or whether he aided, abetted, solicited, induced, incited, counseled, encouraged, caused, hired, or commanded the sale. The answer was always the same, even though the statutes penal-

* There were many such cases. A sufficient number of them are cited in *Lott* v. *United States*, 205 Fed. 28 (9th C. C. A. 1913), from which we later quote. There was only one case contra: *State* v. *Bonner*, 2 Head 135 (Tenn. 1858), which involved a sale by a slave and was later overruled: *Harney* v. *State*, 8 Lea 113 (Tenn. 1881). The only case before 1919 involving a statute expressly penalizing the purchase which we have found is *Walt* v. *People*, 46 Colo. 136, 144 (1909); that case was not, however, one in which a purchaser was punished. The Nebraska prohibition law of 1917 expressly penalized "purchase." Comp. Stat. Neb., 1922, Sec. 3238. We have not seen any other statutes prior to 1919 which fixed the purchase with a penalty, although there might have been some. Black on Intoxicating Liquors, p. 443 (1892), and 2 Woollen and Thornton on Intoxicating Liquors, p. 1220 (1910), suggest that there might be such statutes, although they cite none. Since the Eighteenth Amendment, Texas, at least, has expressly penalized the purchase: *Robert* v. *State*, 88 Tex. Cr. 488, 228 S. W. 230 (1921). So far as we have found, no federal liquor law prohibited the purchase. This Court has said, by way of dictum, that a state could, under its police power, constitutionally prohibit the purchase of liquor: *Crane* v. *Campbell*, 245 U. S. 304, 307; *Samuels* v. *McCurdy*, 267 U. S. 188, 194; we have seen no case in this Court where such a statute was involved.

ized the specific acts of aiding, abetting, etc., just enumerated. In short, the uniform holding was that the purchaser committed *no* crime at all, and there was uniform legislative acquiescence in such construction. The undoubted legislative policy thus shown was to penalize the sale but not the purchase. That was true whether the cases were on indictments charging the purchaser with an alleged crime, or where the question was whether the purchaser had committed a crime and so would incriminate himself if he gave testimony against the seller. The scope of such latter cases is all-inclusive because if the proposed witness (the purchaser) had committed *any* crime in connection with the purchase, his testimony would incriminate him.

Com. v. *Willard,* 22 Pick. 476 (Mass. 1839), is an early and leading case of this latter kind and has always been followed. The defendant Willard had been committed for contempt for refusing to testify to an unlicensed sale. Chief Justice Shaw said, at p. 477:—

> "But the Court are of opinion, that the witness would not be liable to *any* prosecution as such purchaser, and therefore would not criminate himself or expose himself to punishment by such a purchase. No precedent and no authority has been shown for such a prosecution, and no such prosecution has been attempted within the knowledge of the Court, although a similar law has been in force almost from the foundation of the government, and thousands of prosecutions and

convictions of sellers have been had under it, most of which have been sustained by the testimony of buyers. *That such a prosecution is unprecedented, shows very strongly what has been understood to be the law upon this subject.*"

And he added, at p. 479:—

"The Statute imposes a penalty, upon any person who shall sell. But every sale implies a purchaser; there must be a purchaser as well as a seller, and this must have been known and understood by the legislature. Now, if it were intended that the purchaser should be subject to *any* penalty, it is to be presumed, that it would have been declared in the statute, either by imposing a penalty on the buyer in terms, or by extending the penal consequences of the prohibited act, to all persons aiding, counselling or encouraging the principal offender. There being no such provision in the statute, there is a strong implication, that none such was intended by the legislature." (Italics ours.)

That Court concluded that the purchaser committed no offense at all.

A full discussion of the entire subject is contained in *Lott* v. *United States,* 205 Fed. 28 (9th C. C. A. 1913), where the purchaser, an Indian, was indicted for soliciting and inciting the seller to commit the Federal crime of furnishing liquor to an Indian who was none other than the purchaser Lott, himself. The Circuit Court of Appeals reversed a conviction, with instructions to dismiss the complaint. The Court said:—

"What was the intention of Congress in enacting the law? Was it intended to make unlawful the act of purchasing intoxicating liquor? If the answer is in the negative, it follows that an Indian who attempts to purchase intoxicating liquor, or solicits another to sell it to him, is guilty of *no* offense." (P. 31.)

"Congress must have been aware of the universal ruling of the courts that under laws prohibiting the sale of intoxicating liquors the purchaser committed *no* offense. We are not justified in assuming that, in so amending the law and increasing the punishment for its violation, it was the intention to make criminal, and subject to punishment as a crime, the act of purchasing or attempting to purchase intoxicating liquors, which theretofore had been innocent acts. *If such had been the intention of Congress, it is but reasonable to presume that it would have been expressed in such clear terms as to admit of no doubt.* In the absence of such express legislation, we are authorized to presume that Congress deemed it of greater advantage to the government in enforcing the law to leave the Indian who might succeed in purchasing liquor in Alaska free to testify in the courts against the seller thereof, than to punish the Indian for purchasing, or offering to purchase, the same."* (P. 31-2.) (Italics ours.)

* In the *Lott* case, the indictment was under a pre-existing statute which adopted for Alaska the common law of crimes, including the rule that soliciting a crime is itself a crime. The significance of the decision is that such earlier general enactment must be construed and applied in the light of the legislative intent manifest in the later specific statute creating the substantive crime involved.

These are but examples of the old and universal line of cases which had consistently held that under all such liquor legislation, a purchaser had not been made a criminal. That was the chapter of legal history which was before Congress when it embarked upon the project of national prohibition.*

That project was not decided upon without due deliberation. The first proposal for a prohibition amendment to the Federal Constitution was made in Congress in 1876. From then until the Eighteenth Amendment was adopted, at least 57 such proposals were made in Congress.†

To decide upon a governmental policy is relatively easy compared to the task of determining upon a practical plan for carrying the policy into effect. For example, it is a simple matter to decide that taxes must be collected; but to determine just how, and upon what or whom, the tax should be levied calls for statesmanship of the highest order. So it

* It is to be presumed that Congress had knowledge of the prior laws. *United States* v. *Turner*, 266 Fed. 248, 250 (D. C. Va. 1920). We also know from Mr. Volstead that Congress had actual knowledge thereof. In speaking of the origin of the Prohibition Act, he said: "No one should draw a bill of this kind without making use of legislation that has been tried out in other jurisdictions. Anyone who would attempt to originate a bill without doing that would be exceedingly foolish." Vol. 58 Cong. Rec. part 3, p. 2512.

† Ames, Amendments to the Constitution, Ann. Rept. Am. Hist. Assn., 1896, Vol. II, pp. 272-3; Musmanno, Proposed Amendments to the Constitution, House Doc. 551, 70th Cong., 2d sess., pp. 230-1.

was with prohibition. To decide that there should be national prohibition was but the beginning and the easier part of the matter. How prohibition in law should be attempted to be made prohibition in fact was a question most difficult to decide. Just what steps of the traffic should be proscribed was a most important and delicate matter. The possible social consequences had to be weighed. These were questions which were peculiarly within the province of the legislature.

The successive steps of manufacture, transportation, sale, purchase and use were separately considered in the deliberations over the scope of the Eighteenth Amendment. It was determined that the best way to stop the traffic was at its source; and this for two reasons: (1) because it was the practical means of achieving the desired physical result; and (2) because to make the purchase of liquor a crime would have made half our population criminals over night.

It is not to be supposed that the plan initially adopted by Congress will necessarily be the final one. It was very important that the practical plan first tested should be one which would not immediately involve millions of citizens in crime. The late Chief Justice Taft fully recognized all this, as is shown in his letter to Mr. Fisher: "The habits of an important section of a congested part of the country cannot be changed overnight or in years. The reform

and the adaptation of society to that at which the amendment aims must be gradual." The United States Daily, Mar. 20, 1930, p. 3, col. 4.

At one time in the deliberation over the Eighteenth Amendment, it was expressly proposed to include the prohibition of "purchase" along with that of "manufacture, sale or transportation." That proposal was overwhelmingly rejected in the Senate by a vote of 4 to 62.*

* The proposal to prohibit "purchase" included "use." Both were alike rejected. The debates in the Senate are in Vol. 55, Cong. Rec., part 6, pp. 5548-5560, 5585-5627, 5636-5666. In support of the above proposal, it was argued (p. 5645): "It is hard for me to see why, if the manufacture and sale are to be forbidden, the purchase ought not also to come under the ban of the law. It is impossible for me to understand why, if it is to be unlawful to manufacture and to sell it, to buy it and transport it, to import it or export it, it ought not also to be unlawful to use it. Now, if we are going to perform this task thoroughly, if we are going to work it out completely, let us go the whole length while we are at it; let us prohibit not only the exportation, importation, transportation, and sale, but the purchase as well, and if all those things are to be forbidden, let us forbid its use as well. That is complete prohibition, practical prohibition, and it seems to me those who are so anxious to give the people real prohibition ought to be willing to vote for the amendment; that is, if they are really for real prohibition." It was questioned whether it would not "be more difficult to secure a conviction or to secure evidence of an illegal sale if the purchase of it also were made illegal, because the witness, who, as a rule, is the purchaser, would be protected from answering on the ground that the answer might incriminate himself." It was answered that other evidence could be obtained and that purchasers could be given immunity if they testified.

The debates in the House are in Vol. 56, Cong. Rec., part 1, pp. 422-470. A minority report of the House Judiciary Com-

Just as "purchase" was intentionally omitted from the Eighteenth Amendment, so was it likewise intentionally omitted from the prohibitions of the Volstead Act.* It is also to be noted that Sec. 3 of the Act prohibits and penalizes "delivery" but not "receipt." The report of the House Judiciary Committee expressly stated that Title II of the Act "has in it no new or experimental features. Every provision in it has precedents in state or Federal legislation."† We have seen that all such precedents consistently had provided no prohibition or penalty for a purchaser. Unquestionably there is manifest

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mittee, opposing the Amendment as phrased, pointed out that "all questions concerning the use of intoxicating liquor for beverage purposes depend upon the buyer and the seller, or, to speak more properly, upon the consumer and the seller." H. R. Rept. No. 1493, 64th Cong. 2d sess., part 2 (Cong. Doc. 7110). However, no change which is pertinent here was made by the House in the form of the Senate Resolution for the Eighteenth Amendment.

* In discussing appropriate language for the latter part of Sec. 3, Title II, which deals with non-beverage and sacramental liquors, Mr. Volstead pointed out, "There is no prohibition expressly against purchase in the first part of the section" (Vol. 58, Cong. Rec. part 3, page 2802). The first part of the section to which Mr. Volstead referred deals with prohibition for beverage purposes.

† H. R. Rept. 91, 66th Cong. 1st sess. (Cong. Doc. 7592), p. 7; it is also printed in Vol. 58 Cong. Rec. part 3, pp. 2294-6. The above quotation is also quoted in *United States* v. *Katz*, 271 U. S. 354, 360. The prohibition of "use" was in the House Bill but was taken out and is not in the Act. The committee said that "possess" was left in the Act because possession outside of a residence would be illegal: Sen. Rept. 151, 66th Cong. 1st sess.

a definite and well considered intent in Congress in passing the Volstead Act not as yet to lay a hand upon the purchaser.

This manifest legislative intent not to touch the purchaser was immediately recognized by the Federal Courts which have unanimously said that, under the Act, it is not a crime to purchase although the sale has been penalized. Typical statements are:—

"It is a crime to sell, but not a crime to purchase."*

"Buying is not a crime."†

"The statute is directed against the seller, not the purchaser."‡

Congress has been in session repeatedly since this interpretation of the Act has been reiterated by the Courts, and Congress has not amended the Act so as to make purchase a crime. Thus we have a definite

(Cong. Doc. 7590), p. 14. The debates on the Act are found in Vol. 58, Cong. Rec., parts 3-8, pp. 2280-2303, 2308, 2426-2443, 2445-2486, 2494-2513, 2552-2573, 2775-2808, 2856-2905, 2949-2977, 3004-3006 (House); 3920, 4789, 4833, 4836-4852, 4888, 4892-4896, 4903-4909 (Senate); 5080, 5081 (House); 5149 (Senate.) The conference report is in H. R. Rept. 360, 66th Cong. 1st sess. (Cong. Doc. 7593) and Sen. Doc. No. 118, 66th Cong. 1st sess. (Cong. Doc. 7610); it is printed in 58 Cong. Rec. 6431-3; debates and proceedings thereunder are in 58 Cong. Rec. pp. 6532, 6549-6552, 6681-6698, 6924, 6955, 7015, 7607-7611, 7621-7625, 7626-7634.

* *Singer* v. *U. S.*, 278 Fed. 415, 419 (3d C. C. A. 1922), *certiorari* denied, 258 U. S. 620 (1922).

† *Vannata* v. *U. S.*, 289 Fed. 424, 428 (2d C. C. A. 1923).

‡ *Dickerson* v. *U. S.*, 18 Fed. (2d) 887, 894 (8th C. C. A. 1927).

legislative intent, a judicial interpretation consistent with that intent and clear legislative acceptance of that interpretation. Therefore, we say that Congress had not, and has not, intended to make purchase a crime.*

A conviction in this case will defeat that legislative intent. The attempted use of the Conspiracy Act to such an end has repeatedly been condemned. The late Circuit Judge Hough of the second circuit spoke of such practice as "an indirection—an underhand way of doing something the Legislature never thought of" and as "a great stretch on the part of the prosecutor of the *quasi* judicial power lodged in him." This was said in *Vannata* v. *United States,* 289 Fed. 424, 428-9 (2d C. C. A. 1923), where, to increase the penalty, an indictment for conspiracy was secured against the *seller* and admittedly well laid.

Former Assistant Attorney General Willebrandt

* Congress has been alive to the enforcement of the Act and the decisions under it. Even in the debates on the Act itself, before its enactment, it was recognized that "this is not the last act of legislation upon the subject of prohibition in the United States. This law will have to be amended in the future, and for years to come perhaps every session of the Congress will have to deal with laws enforcing the eighteenth amendment." Vol. 58 Cong. Rec. part 3, p. 2286. For example, there was a conflict among the district courts as to whether the Prohibition Act repealed the old revenue laws. This Court then held that it had. *United States* v. *Yuginovich,* 256 U. S. 450. Congress then passed the Supplementary Act of Nov. 23, 1921, 42 Stat. 222, providing that the old revenue laws remain in force, and they are now enforced. *United States* v. *Stafoff, 260* U. S. 477. Although the decision in the case at bar has been much discussed in Congress, the law has not been amended.

testified before the House Judiciary Committee, at hearings on the Jones Bill (Increased Penalties Act of Mar. 2, 1929, 45 Stat. 1446), that "as a result of the inadequacy of the penalty which the Volstead Act provides for the things the Constitution prohibits, prosecutors have been led to resort to prosecutions under other laws than the Volstead Act whenever they could * * *. In my estimation, Section 37 (Conspiracy Act) has been strained beyond all reach in grounding liquor-law prosecutions under it."

The committee, in reporting favorably on the Jones Bill, said that it would not operate harshly but would "merely provide an adequate penalty without the necessity of making a strained resort to laws other than those for the enforcement of the prohibition." Sen. Rept. 768, 70th Cong. 1st sess. (Cong. Doc. 8830).

The Conference of Senior Circuit Judges has also protested against misuse of the Conspiracy Act. Rep. Atty. Gen. for 1925, 5-6; Frankfurter and Landis, The Business of the Supreme Court, 250-1.

Regardless of this aspect of the conspiracy charge, it is bound to fail; under established principles of law, it cannot succeed. This brings us to Point 2 of our argument.

POINT 2:—INASMUCH AS THE ONLY TRANSPORTATION HERE INVOLVED WAS THE DELIVERY OF THE LIQUOR SOLD AND THUS AN ESSENTIAL ELEMENT OF THE SALE, AN INDICTMENT OF THE PURCHASER AS A CONSPIRATOR TO SUCH ELEMENT OF THE SALE WILL NOT LIE.

The first attempt at such a use of the Conspiracy Act to come before this Court was *United States* v.

Katz, 271 U. S. 354, where the buyer and seller were indicted for the conspiracy to sell without making a permanent record of the sale, in violation of Sec. 10, Title II, of the Prohibition Act. There was only one buyer and one seller and the sale was a bootleg transaction. This Court held that Sec. 10 did not apply to bootleg sales; consequently a bootlegger and his purchaser could not conspire to violate it. The *Katz* case was nothing more than an attempt to fasten a purchaser with a crime. It failed.

Mr. Justice Stone also pointed out the embarrassment which would follow if the buyer and seller were indicted for conspiracy to make a mere sale. Suffice to say that no prosecuting officer has had the hardihood to attempt it.

After ten years of prohibition enforcement a new attempt to reach the purchaser is now made, viz., an indictment for conspiring with the bootlegger to transport. The Government cannot point to any case, decided at any time, in which a defendant has been held guilty of conspiring with the seller at the transportation of any goods, the sale of which was illegal, when all such defendant did was purchase the goods delivered. Nevertheless, that is attempted here. The question is squarely raised for a decisive opinion by this Court. It has been before two other circuit courts and passed on in the same way as the circuit court in the case at bar decided it.

The question first arose in *Becher* v. *United States*,

5 F. (2d) 45 (2d C. C. A. 1924), a case of conspiracy, including conspiracy to transport. There had been a comprehensive plan involving the importation of liquor, its storage in bonded warehouses, and its withdrawal on forged permits and the procuring of bonds of indemnity against liability for import duties. One Birnbaum was admittedly in some way involved. He contended that he was merely a buyer of some of the imported liquor and that as nothing was proved against him except that *the liquor had been delivered to him* and found in his cellar, there was no proof that he was a conspirator. Judge Learned Hand, speaking for a unanimous court, said at page 50:—

> "We concede at once that merely as *buyer* he was not a party to the scheme in *any* criminal sense, that on the contrary the prosecution was bound to involve him *in the plan as a whole in some other sense.*" (Italics ours.)

Although some of the packages of this particular imported liquor were found in his cellar, with the mark obliterated,

> "Still all this was indeed equally consistent with his being a large buyer and did not show his complicity."

Thus we see that the Circuit Court for the Second Circuit expressly rejected the doctrine which the Government advances here. Had that Court agreed with such doctrine it would have simply said that even if the facts were as Birnbaum contended, the result

would nevertheless be that he had committed the crime of conspiring to illegally transport because the liquor he had bought had been delivered to him in fulfillment of his purchase. On the contrary, the Court was at pains to go much further and show, through proofs of other acts (not of interest to us here because nothing of the sort is involved in the instant case), that Birnbaum was in complicity with the others and had himself acted in other ways in furtherance of the crimes which they all had conspired to commit.

The question next arose in *La Rosa* v. *United States*, 15 F. (2d) 479 (4th C. C. A. 1926). La Rosa was indicted, with others, for conspiracy, including conspiracy to transport. The only understanding La Rosa had with the others was that he would buy certain whisky from them and show them how to get it to his garage. He met them in his car outside the city where his garage was located, they being in their car with the whisky, and he piloted them, driving his own car, they following in theirs, to his garage where they left the whisky. Circuit Judge Rose, speaking for a unanimous Court, said that La Rosa had aided and abetted the transportation; but he added, at p. 481:—

> "We shall not go into the nice inquiry as to whether such an understanding would or would not suffice to sustain a charge that he [La Rosa] had entered into a conspiracy with them for the unlawful transportation of the liquor. If it

> does, seemingly anyone who agrees to buy liquor from a bootlegger, and tells him how to get it to his back door with it, commits an offense punishable by imprisonment in the penitentiary for as much as two years and by a fine of $10,000."

Judgment of conviction for conspiracy was reversed. The Court unequivocally rejected the precise contention which the Government now renews in this Court. Yet the *La Rosa* case presented a stronger case for the Government than does the case at bar, because La Rosa did much more than Norris did. The Court said that La Rosa aided and abetted the transportation but even that was not sufficient to cause it to consider the question of the conspiracy to transport. The question in this case was squarely raised in the *La Rosa* case, both under the indictment and on the facts proved, so the refusal of that Court "to go into the nice inquiry" is a clear holding that the Government's position was too tenuous to merit the serious consideration of that Court.

In both the *Becher* and *La Rosa* cases, the liquor purchased was in such large quantities that, as Circuit Judge Rose said in the *La Rosa* case, p. 481:—

> "From the quantity and character of the intoxicants found, it might be assumed that La Rosa expected to sell the larger part of them."

The *Becher* and *La Rosa* cases were, therefore, much stronger cases than this case against Norris who pur-

chased "for his own consumption or that of his guests; and he was in no sense a dealer of liquor." (Stipulation of Facts, R. 4.)

Of course, as purchaser, Norris expected the liquor to be delivered to him. Sale by the seller necessarily involves purchase by the buyer; and there is no sale until there is delivery. Delivery of the goods sold is an essential element of the sale. Sometimes the delivery is symbolic but there is none the less a delivery. Usually there is a transportation-delivery; and where the transportation is simply that which effects the delivery, such transportation is an essential element of the sale.

Here there was only one seller and one purchaser; the transportation was simply that which effected delivery. The agreement of both parties was requisite to the sale which necessarily includes its essential elements. Therefore an indictment of the buyer and seller for conspiring to an essential ingredient in that transaction will not lie. The classic examples are cases of bigamy, dueling and adultery. Since the commission of these crimes requires concert of two persons to effect the substantive offense, neither one can be guilty of the crime of conspiring to commit the substantive offense, by virtue of such requisite concert alone. *Shannon* v. *Com.,* 14 Pa. 226 (1850, per Gibson, *C. J.*). This is the rule in the Federal Courts. See *U. S.* v. *Dietrich,* 126 Fed. 664 (Cir. Ct. Neb. 1904) where Circuit Judge Van Devanter, now a jus-

tice of this Court, applied the rule to a case of bribery, where the substantive offense was punishable under a separate Act of Congress, and the attempt was made, unsuccessfully, to punish under the same Conspiracy Act as that involved in this case. Judge Van Devanter said:—

> "The gravamen of the charge is that the defendants conspired—united in purpose and agreed together—to commit an offense against the United States."

He quoted from Wharton's Criminal Law:—

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. As crimes to which concert is necessary (*i. e.*, which cannot take place without concert), we may mention dueling, bigamy, incest, and adultery, to the last of which the limitation here expressed has been specifically applied by authoritative American courts. We have here the well-known distinction between *concursus necessarius* and *concursus facultativus*—in the latter of which the accession of a second agent to the offense is an element added to its conception; in the former of which the participation of two agents is essential to its conception; and from this it follows that conspiracy, the gist of which is combination, added to crime, does not lie for *concursus necessarius*. In other words, when

> the law says 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is *not lawful for the prosecution to call it by some other name;* and when the law says such an offense—*e. g.,* adultery—'shall have a certain punishment,' *it is not lawful for the prosecution to evade this limitation* by indicting the offense as conspiracy." (Italics ours.)

The Government points to certain language in *United States* v. *Katz,* 271 U. S. 354, 355, which, it says (Brief, 14), "tends to support" the conspiracy charge. Mr. Justice Stone, speaking for this Court, pointed out, at p. 355, that the overt act charged was the sale of whisky by one defendant to the other, which is an offense under the National Prohibition Act; but that as the defendants

> "were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity."

He went on to point out that:—

> "This embarrassment could be avoided in an indictment for a criminal conspiracy *only* if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient *in addition* to the sale, *not requiring*

the agreement of two persons for its completion." (Italics ours.)

It is obvious that the transportation which does no more than effect the delivery of the goods sold, and which is, therefore, an essential ingredient of the sale, is not what Mr. Justice Stone, in the *Katz* case, called "an ingredient in addition to the sale, not requiring the agreement of two persons for its completion." The only transportation involved in the present case is such delivery-transportation and nothing more.

The "embarrassment" mentioned by Mr. Justice Stone cannot be avoided in this case. Judge Kirkpatrick in the District Court and the Government here attempt to avoid it by pointing to the two hypothetical cases supposed by that judge (R. 7): (*a*) The itinerant bootlegger; and (*b*) the sale of premises containing liquor, followed by the seller moving out and the buyer moving in. They conclude that transportation is not necessarily involved in every sale. It is to be remembered, however, that delivery is necessarily involved in every sale, even including those two hypothetical cases. And where the transportation is no more than delivery-transportation which effects and completes an essential ingredient of the sale itself, and is not in addition thereto, the fact that transportation is made a distinct substantive offense by the National Prohibition Act is beside the point. Their argument overcomes but

one of the two obstacles pointed out by Mr. Justice Stone in the *Katz* case but does not meet his requirement that the subject of the conspiracy indictment must be *in addition* to the sale.

The Government argues that actual delivery to the purchaser of the article sold is not essential to a completion of the sale. It admits that "there is an obligation to deliver under a sale" but asserts that "no formal ceremony is necessary, nor is manual delivery required" (Brief, 16). The cases of *Glasgow* v. *Nicholson,* 25 Mo. 29, *Davis* v. *Alpha Portland Cement Co.,* 134 Fed. 274, and *Patrick* v. *Meserve,* 18 N. H. 300, are cited in support. In all of them, the Courts were simply dealing with the respective contractual obligations of buyer and seller with respect to the means of effecting delivery according to the particular contracts which they had made. In all of them the duty of the seller to deliver the goods sold was recognized. The Government now admits such a duty although it did not in its brief sur petition for the writ. The question often arises as to when the title of goods contracted to be sold passes to the buyer, and that may be at a time which is different from the time of the delivery of the goods. Such questions are entirely immaterial for our purposes although they may be very important in cases of fire, bankruptcy, levy of execution and the like. The fact remains that in all cases of sales there must always be a delivery. Where that delivery is effected by a transportation, the latter

is an essential ingredient of the sale itself. It is not a thing *in addition* thereto.

We are, of course, fully conscious that there may be and is much transportation of liquor which is not a necessary incident to a sale and at which two or more people, including a buyer, upon a showing of the necessary degree of cooperation and concert, could be held as conspirators under the Conspiracy Act. Where such are the facts involved in any such case, then it is very pertinent there that the Prohibition Act makes transportation a distinct substantive offense. Our point is that where the only transportation involved is such transportation as is the normal and necessary incident to the completion of a sale and purchase, the purchaser can no more be held for conspiracy at such delivery-transportation than for conspiring at the sale itself.

The Government need not argue (Brief, p. 13-14) the cases of *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100, *Grogan* v. *Walker & Sons,* 259 U. S. 80, and *Corneli* v. *Moore,* 257 U. S. 491, as holding that such transportation as there was in this case was in violation of that Act. We admit it. The Circuit Court of Appeals so said (R. 15). The seller was guilty not only of an illegal sale but also of an illegal transportation; and Kerper (the seller) has been convicted and paid his penalty for it. Thus the doctrine of the *Cunard* and similar cases has had full recognition and application in this very transaction.

POINT 3:—BY HIS MERE ACT OF PURCHASE, NORRIS DID NOT CONTRIBUTE THAT DEGREE OF COOPERATION NECESSARY TO MAKE OUT A CONSPIRACY.

A conspiracy is "a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose." *Pettibone* v. *United States*, 148 U. S. 197, 203. It is obvious, therefore, that before one charged with conspiracy can be found guilty of that crime, he must be shown to have contributed, in the required degree, to the concerted action. The respondent Norris did not. The sum and substance of his contribution was that which is involved in the mere act of purchase; that which is afforded by every purchaser; and no more. So that even if the delivery-transportation be regarded as not an essential element of the sale itself (which it is), there is still no basis for the charge of conspiracy.

It will not be disputed that there may be a degree of cooperation which is insufficient to meet the requirements of conspiracy. In *United States* v. *Holte*, 236 U. S. 140, 144, Mr. Justice Holmes had occasion to discuss the degree of cooperation requisite to the crime of conspiracy and in the course of his discussion, seeking for an example of cooperation which all would recognize as obviously insufficient, he said

> "there may be a degree of cooperation that would not amount to a crime, as where it was held that a purchase of spirituous liquor from an unlicensed vendor was not a crime in the pur-

chaser, although it was in the seller. *Com.* v. *Willard,* 22 Pick. 476."

We have already pointed out the uniform holding that the purchaser of liquor does not aid, abet, solicit, induce, etc., the sale and is not in any way criminally liable for his purchase, even though the specific acts of aiding, abetting, etc., have been expressly penalized by the prohibitory statutes (pp. 4-9 above).

An illuminating discussion of the degree of cooperation inherent in the purchase is found in *State* v. *Teahan,* 50 Conn. 92, 101:—

"It is insisted however that the statute * * * which provides that 'every person who shall assist, abet, counsel, cause, hire, or command another to commit any offense, may be prosecuted and punished as if he were the principal offender,' governs this case; it being contended that the person who purchases the liquor, induces the seller to commit the crime of selling it, and so aids and abets him in the commission of the offense * * *.

"The abbettor, within the meaning of the statute, must stand in the same relation to the crime as the criminal,—approach it from the same direction, touch it at the same point. This is not the case with the purchaser of liquor. His approach to the crime is from the other side; he touches it at wholly another point * * *. The purchaser of liquor, by his offer to buy, induces the seller of the liquor to make the sale; but he cannot be said to 'assist' him in it."

Obviously, if Norris conspired, he was a "principal offender" to the conspiracy and "stood in the same relation" to it as Kerper did. And yet the *Teahan* case (like all the other cases) has clearly said that the purchaser does no such thing. As early as 1839 Chief Justice Shaw said, in the *Willard* case, that although there had been thousands of prosecutions and convictions of sellers, there had not been any prosecution of any purchaser for any kind of offense.

The *Becher* and *La Rosa* cases, the instant case, and the principle quoted above from the *Holte* case, had back of them this long and uniform line of cases holding that the part played by the purchaser in an unlawful sale of liquor does not render him in any way criminally liable. The instant case, therefore, could not have been properly decided in any other way.

The cases dealing with "entrapment" by Federal agents also confirm the decision of the Court below with respect to the degree of cooperation necessary to constitute one a conspirator. A defendant will not be convicted where Government agents have induced him to commit the crime or conspired with him for its commission. To get evidence, Government agents customarily make purchases of the prohibited goods, *e. g.*, drugs or liquors, from suspected unlawful vendors. In such cases, the defense that the Government agents by so doing entrapped, induced or conspired with the defendant in such a way and to such an extent as to give him the benefit of the entrapment

rule, has been uniformly held not a good defense where the agents merely purchased goods delivered to them, for the reason that the mere purchase is not such an entrapment, inducing or conspiracy. See, for example, *Lucadamo* v. *United States,* 280 Fed. 653 (2d C. C. A. 1922); *Rossi* v. *United States,* 293 Fed. 896 (8th C. C. A. 1923), and *DeLong* v. *United States,* 4 F. (2d) 244 (8th C. C. A. 1925).

The *Rossi* case was one of criminal contempt for violating an injunction against the transportation of liquor as well as against its sale; the court held that the conduct of one who "called up the defendant on a phone and ordered the delivery of 'six,' " falls "far short" of such inducing or soliciting of the delivery as amounts to entrapment. A *fortiori,* such conduct falls far short of the requirements of conspiracy.

All the pertinent cases, of which those cited by us are leading examples, clearly show that Norris did not furnish such degree of cooperation as is an essential prerequisite to a conviction for a criminal conspiracy. In doing no more than ordering the whisky and paying for it he did nothing which made him a felon.

The Government apparently recognizes this inescapable conclusion since it professes to find the prerequisite degree of cooperation* from the fact that

* The Government's Brief, pp.1-2, erroneously states in the "Question Presented" that Norris' telephone orders to the bootlegger were "to ship him" the liquor. The Stipulation (R. 4-5) which was of ultimate facts and not evidence, and

there were twelve purchases, rather than a single one (Brief, 19). It would be a sufficient answer to point out that the stipulation of Facts (R. 4-5) affords no basis for such a contention. It shows no connection whatever between the separate purchases. Each is an isolated transaction, in itself insufficient. Clearly, a repetition of non-criminal acts does not constitute a crime.

Any discussion of this point is idle because the Government is foreclosed to make it; and the point was eliminated at the instance of the Government itself. No such contention was made in either the district or circuit courts. Indeed, at the argument in the Circuit Court, counsel for the Government "frankly stated and repeated" "their clear purpose" to limit the question of conspiracy to one of a single sale (R. 13). The Circuit Court so understood, as plainly appears from the first half of its opinion (R. 12-14). That was undoubtedly the question which that court

which contains all the facts, includes no such fact. The fact stipulated simply is that the shipments were made "to fill orders for rye whisky" given over the telephone. Of course, it was immaterial to Norris whether the whisky was shipped, or got to him in some other way. The Government's brief filed with the Circuit Court contained the statement (pp. 1, 11) that Norris requested and directed that the liquor be shipped to him by express. When we called the attention of the counsel of the Government to this error, it was frankly admitted as unintentionally made and the Circuit Court was requested, at the argument, by Government counsel, to disregard the statement and to strike it from their brief.

decided and, necessarily, it is the only question which is before this Court for review.*

If the Government is now attempting "to embrace a contention which had been expressly disclaimed and which could not be in the case consistently with the previous statement of counsel as to the one and sole point which they desired to raise," the short answer, that, under the rulings of this Court, it cannot now be done, is a sufficient one: *Great Northern Ry. Co.* v. *United States,* 208 U. S. 452, 470, 471. *Alice State Bank* v. *Houston Pasture Co.,* 247 U. S. 240, 242. *Webster Electric Co.* v. *Splitdorf Electrical Co.,* 264 U. S. 463, 464.

The Government also states (Brief, p. 20) that Norris, to effect the transportation of the liquor to him, accepted packages from the express company

* This case was at that time, at least, regarded as a test case by which the Government hoped to have this question of conspiracy to transport, by virtue of a purchase, definitively adjudicated. Unless the question here were so limited, the decision in this case would be valueless as a binding precedent of wide application, and the granting of the *certiorari* on the ground that the case "is one of great public interest and importance" (Petition, p. 10) would appear to have been under misapprehension of what the Government intended to urge here. Whether Norris must pay a $200. fine is of no moment. If all this Court is to decide is whether twelve purchases can make out a case of criminal liability (although a single one might not), the question of the effect of eleven, or ten, or nine, etc., will remain. The question would ultimately come down to one; and it is that question which is here involved. It is for the decision of such ultimate questions of prime importance that the exercise of the discretionary jurisdiction of this Court is reserved.

which had false labels and fictitious consignors; that he deceived the carrier by failing to disclose the true facts to it, knowing that if he did disclose them the transportation would not be undertaken; that he violated Sections 14 and 15 of the Prohibition Act by thus inducing the carrier to ship liquor without such disclosure, and by receiving such packages from the carrier. These allegations are both contrary to the stipulated facts and entirely outside of them.* Kerper, and not Norris, was the shipper. He alone effected the transportation. Such deception and inducing of the carrier as was done was Kerper's. There is nothing whatever to show that Norris personally received the shipments from the express company; consequently no criminal act or intent can be predicated upon such a gratuitous and unfounded assumption as the Government has made. The assertion that Norris violated Sections 14 and 15 is an entirely new one, has no foundation in fact, and has no bearing upon the question before this Court.† We will not consider it further.

The Government argues (Brief, pp. 21-22) that the opinion of the Circuit Court has the effect of giving the purchaser a special immunity. That is not true. The decision throws no kind of immunity around

* We wish to call the Court's attention to the footnote on p. 29.

† It is to be recalled that the second count of the indictment, which necessarily involved Norris' alleged acts in this connection, was waived.

the purchaser just because he is a purchaser. As the Circuit Court said in its opinion, "There would be no difficulty in conceiving a set of facts, which, if established, would sustain * * * an indictment [for conspiracy to transport], notwithstanding the conspiracy existed between the seller and the buyer" (R. 13). The decision simply is that merely being a purchaser does not carry with it the felony of being a party to a conspiracy to transport the liquor purchased when all that is done is that the *seller* delivers to the purchaser the liquor sold him. Of course, if a purchaser goes farther and does more, it is entirely possible that he may make himself a conspirator. There are many cases where a defendant has been properly convicted of conspiracy, even though he happened also to have been a purchaser. *Becher* v. *United States,* 5 F. (2d) 45, is a good example. We commented on that case at p. 16 ff above. It is a sufficient answer to this contention.

The Government says that if the decision in the case at bar is allowed to stand it will have a very detrimental effect upon prohibition enforcement. Quite the contrary. This decision works no change in enforcement. The Prohibition Act has been administered for ten years without there ever having been one single conviction of a purchaser such as Norris for conspiracy to transport. It is, therefore, difficult to see how this decision can have any detrimental effect upon that enforcement, when the decision allows that enforce-

ment to remain without change as it has always been. If the state of the law of criminal conspiracy, as shown by this case, is in such condition that it has detrimental effect on prohibition enforcement, then that same condition has existed as long as there has been prohibition to enforce. To contend now that to allow this decision to stand will have a detrimental effect on enforcement, and to ask for reversal, is to plead for a change which looks to the future. But the making of such changes is the province of the legislature. This is particularly true of the Federal criminal law, which is purely a matter of legislation.

For what he here did, Congress has not made Norris a felon. Knowingly, and, it is to be presumed, wisely, it has thus far pursued the fixed and manifest intention not to do so. If, after 10 years, there is to be a change, it is for Congress to make it.

We respectfully submit that the decision of the Circuit Court of Appeals should be affirmed.

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APRIL, 1930.

SUPREME COURT OF THE UNITED STATES.

No. 555.—October Term, 1929.

The United States of America, Petitioner, vs. Alfred E. Norris. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 26, 1930.]

Mr. Justice Sutherland delivered the opinion of the Court.

Norris and one Kerper were indicted by the federal grand jury for the Eastern District of Pennsylvania, charged in two counts with conspiring unlawfully to transport and cause to be transported, from Philadelphia to New York, certain shipments of intoxicating liquor, in violation of the National Prohibition Act of October 28, 1919, c. 85, § 3, 41 Stat. 305, 308; U. S. C., Title 27, § 12. The indictment is sufficient in form and substance. Kerper pleaded guilty, and Norris entered a plea of *nolo contendere*. When the latter appeared for sentence, there was filed a stipulation of facts which it was agreed should be taken to be true and of record with like effect as if set forth in the indictment. The pertinent portion of the stipulation is copied in the margin.* Thereupon, Norris submitted a motion in arrest of judgment upon the grounds that upon the face of the record he was not guilty of the crime charged; that the record disclosed that he merely purchased liquor, and that this did not constitute a crime; and that the record failed to show

*"Defendant, Alfred E. Norris, resides at 55 East Seventy-second Street, New York City. His business is that of investment banker.

"Joel D. Kerper, the other defendant, for some years prior to the date of the indictment in the above case, conducted at premises known as 341 Walnut Street, Philadelphia, Pa., a business consisting in major part of the sale and transportation incidental to sale, of intoxicating liquors, in violation of the National Prohibition Act. Pursuant to said business, the said Joel D. Kerper supplied a large number of customers in Philadelphia, New York, and other places. In the course of his business conducted as aforesaid, the said Joel D. Kerper on the dates indicated, made the following shipments by prepaid express from Philadelphia to the said Alfred E. Norris, addressed to him at 55

such degree of affirmative cooperation on his part as would render him liable as a conspirator in the unlawful transportation. The motion was denied and judgment rendered against Norris, who was, thereupon, sentenced to pay a fine of two hundred dollars. The district court treated the stipulation as "evidence . . . for the information of the court in determining what sentence, if any, ought to be imposed upon the defendant Norris," which it "received and made part of the record for the limited purpose above stated." 29 F. (2d) 744. The court of appeals sustained the sufficiency of the indictment, but, considering the case upon the stipulation of facts, reached the conclusion that the transactions therein disclosed did not subject the purchaser and seller of intoxicating liquor to an indictment for conspiracy to transport, and reversed the judgment of the trial court. 34 F. (2d) 839.

In the face of an indictment good in form and substance, and of a plea thereto of *nolo contendere*, which, although it does not create an estoppel, has all the effect of a plea of guilty for the purposes of the case (*Hudson* v. *United States*, 272 U. S. 451, 455; *United States* v. *Lair*, 195 Fed. 47, 51), the stipulation was ineffective to import an issue as to the sufficiency of the indictment, or an issue of fact upon the question of guilt or innocence. If the stipulation be regarded as adding particulars to the indictment, it must fall before the rule that nothing can be added to an indictment without the concurrence of the grand jury by which the bill was found. *Ex Parte Bain*, 121 U. S. 1. If filed before plea and given effect, such a stipulation would oust the jurisdiction of the

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East Seventy-second Street, New York City. These shipments were labeled as containing the merchandise indicated in each case, and purported to be sent by the shippers named:

(The list is omitted.)

"In all of the above cases, defendant, Joel D. Kerper, was the true shipper, instead of the fictitious shipper named; and in every instance the package contained an unlawful shipment of intoxicating liquor for beverage purposes; to wit: rye whiskey. Said shipments were made by defendant, Joel D. Kerper to defendant, Alfred E. Norris, to fill orders for rye whiskey given by said Alfred E. Norris to said Joel D. Kerper over the telephone. Payment for said rye whiskey was made from time to time by Norris to Kerper, either in cash or by check. The said rye whiskey was purchased by defendant, Alfred E. Norris, for his own consumption or that of his guests; and he was in no sense a dealer of liquor."

court. *Id.*, p. 13, citing (at pp. 8, 9) *Commonwealth* v. *Maher*, 16 Pick. 120, and *People* v. *Campbell*, 4 Parker's Cr. Cas. 386, 387, holding that the defendant's consent does not affect the rule. After the plea, nothing is left but to render judgment, for the obvious reason that in the face of the plea no issue of fact exists, and none can be made while the plea remains of record. Regarded as evidence upon the question of guilt or innocence, the stipulation came too late, for the plea of *nolo contendere*, upon that question and for that case, was as conclusive as a plea of guilty would have been. And as said by Mr. Justice Shiras in *Hallinger* v. *Davis*, 146 U. S. 314, 318, "If a recorded confession of every material averment of an indictment puts the confessor upon the country, the institution of jury trial and the legal effect and nature of a plea of guilty have been very imperfectly understood, not only by the authors of the Constitution and their successors down to the present time, but also by all the generations of men who have lived under the common law."

The court was no longer concerned with the question of guilt, but only with the character and extent of the punishment. *People ex rel. Hubert* v. *Kaiser*, 206 N. Y. 46, 51-52. The remedy of the accused, if he thought he had not violated the law, was to withdraw, by leave of court, the plea of *nolo contendere*, enter one of not guilty, and, upon the issue thus made, submit the facts for determination in the usual and orderly way.

As to whether the stipulated facts, if open to consideration, make out a case of criminal conspiracy, we express no opinion.

The judgment of the Court of Appeals is reversed and that of the District Court affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.